Supreme Court, U.S.
FILED
MAR 5 2001
CLERK

No. 00-1250

**IN THE**
**Supreme Court of the United States**

---

**US AIRWAYS, INC.,**
*Petitioner,*

**v.**

**ROBERT BARNETT,**
*Respondent.*

---

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

# BRIEF IN OPPOSITION

---

William C. McNeill, III
Claudia Center*
THE EMPLOYMENT LAW CENTER, A PROJECT OF THE LEGAL AID SOCIETY OF SAN FRANCISCO
1663 Mission Street
Suite 400
San Francisco, CA 94103
(415) 864-8848

Todd Schneider
SCHNEIDER, MCCORMAC & WALLACE
1700 California Street
Suite 340
San Francisco, CA 94109
(415) 440-3440

**Counsel of Record*

Richard L. Davis
18161 North Timber
Ridge Drive
Surprise, AZ 85374
(623) 544-0354

Robert W. Rychlik
P.O. Box 10847
Palm Desert, CA 92255
(760) 772-4737

*Attorneys for Respondent*
ROBERT BARNETT

## PETITIONER'S QUESTIONS PRESENTED

1. Whether, as the *en banc* Ninth Circuit held below, the ADA requires an employer to reassign a disabled employee to a different position as a "reasonable accommodation" even though another employee is entitled to hold the position under the employer's bona fide and established seniority system, or whether, as other courts of appeals have held, the ADA's "reasonable accommodation" requirement does not compel an employer to disregard the rights of other employees under its seniority policy.

2. Whether, as the *en banc* Ninth Circuit held below, evidence of an employer's failure to engage in an interactive process with a disabled employee to identify reasonable accommodations precludes the employer from obtaining summary judgment in an ADA action, or whether, as other courts of appeals have held, any failure on the part of the employer to engage in such an interactive process is of no legal consequence in determining whether the employer violated the ADA.

## TABLE OF CONTENTS

PETITIONER'S QUESTIONS PRESENTED..... i

TABLE OF CONTENTS..... ii

LIST OF APPENDICES.....v

TABLE OF AUTHORITIES ..... vi

INTRODUCTION .....1

STATEMENT OF THE CASE.....2

ARGUMENT .....5

I. THE CIRCUITS ARE IN SUBSTANTIAL AGREEMENT THAT A DISABLED EMPLOYEE UNABLE TO PERFORM THE ESSENTIAL FUNCTIONS OF THE CURRENT JOB MAY SEEK REASSIGNMENT, EVEN IF THE TRANSFER IS NOT EXPRESSLY PERMITTED BY THE EMPLOYER'S OWN POLICIES.....7

A. There is No Material Dispute that Modification of an Employer's Transfer Policy May Be a Reasonable Accommodation. .....9

B. The Only Exception That Has Developed in the Case Law is When the Requested Transfer is Barred by an Applicable Collective Bargaining Agreement; Even Then, Such Agreements Are Scrutinized Closely to Determine Whether Any Provision in the Agreement Would Permit the Transfer.....13



C. Neither the Recent *Dicta* in *EEOC v. Sara Lee Corporation* Nor the 1997 *Obiter Dicta* in *Foreman* Justify this Court's Intervention. 16

1. Further Development of the Case Law Will Likely Resolve Any Differences Between the Case-by-Case Analysis Used by Most Circuits and the Fourth Circuit's *Dicta* Suggesting a *Per Se* Rule. .....17

2. Here, Unlike the Seniority Policy Discussed in *Sara Lee*, the Employer's Policy Had Been Unilaterally Modified to Assign Vacancies Regardless of Seniority, and Created No Contract Rights; Additionally, the Employer Presented No Specific Evidence That Permitting Mr. Barnett to Remain in the Position Would Be Disruptive.....19

II. THERE IS NO CONFLICT IN THE CIRCUITS REGARDING THE LEGAL SIGNIFICANCE OF AN EMPLOYER'S FAILURE TO ENGAGE IN AN INTERACTIVE PROCESS WITH ITS DISABLED EMPLOYEE: THE CIRCUITS AGREE THAT SUCH A FAILURE HAS NO INDEPENDENT LEGAL SIGNIFICANCE, BUT IS RELEVANT EVIDENCE OF AN EMPLOYER'S FAILURE TO ACCOMMODATE.....22

A. While an Employer's Failure to Engage in the Interactive Process May Be Evidence Relevant to the Question of Whether the Employer Failed to Provide Accommodation, No Circuit Has Held that an Employer's Failure to Engage Constitutes an Independent Basis of Liability. .....24

B. The Opinion in *Barnett* Joins Several Circuits Noting That Where a Plaintiff Has Identified a Possible Accommodation, *and* Presents Evidence that the Employer Failed to Engage in an Interactive Process, Summary Judgment is Inappropriate. .....25

C. There is No Conflict Among the Circuits that Summary Judgment May Be Granted Against an ADA Plaintiff Where No Possible Accommodation Has Been Identified, Regardless of Whether There is Evidence that the Employer Failed to Engage. .....28

CONCLUSION .....29



## LIST OF APPENDICES

**Appendix A**
In the United States Court of Appeals for the Ninth Circuit,
Sitting *En Banc*
June 22, 2000
Reporter's Transcript of Proceeding
(from official audiotape)

**Appendix B**
Lawrence Deposition, Exhibit X
Appellee's Excerpt of Record, p. 11

## TABLE OF AUTHORITIES

### Cases

*Aka v. Washington Hospital Center*, 156 F.3d 1284 (D.C. Cir. 1998) (en banc) .....*passim*

*Aldrich v. Boeing*, 146 F.3d 1265 (10th Cir. 1998).....14

*Allen v. Rapides Parish School Board*, 204 F.3d 619 (5th Cir. 2000) .....28

*Baert v. Euclid Beverage*, Ltd., 149 F.3d 626 (7th Cir. 1998).....8, 9, 27

*Barnett v. U.S. Air*, 228 F.3d 1105 (9th Cir. 2000) (en banc) .....*passim*

*Beck v. University of Wis.*, 75 F.3d 1130 (7th Cir. 1996).....10, 23, 28

*Benson v. Northwest Airlines*, 62 F.3d 1108 (8th Cir. 1995).....14

*Bell v. Hood*, 327 U.S. 678 (1946).....21

*Bratton v. SSI Servs.*, 185 F.3d 625 (6th Cir. 1999) .....8

*Bridgeway Corp. v. Citibank*, 201 F.3d 134 (2d Cir. 2000).....20

*Bouzianis v. U.S. Air, Inc.*, 1985 U.S. Dist. LEXIS 15470 (D. Mass. Sept. 30, 1985).....20

*Buckingham v. United States*, 998 F.2d 735 (9th Cir. 1993).....14



*Bultemeyer v. Fort Wayne Community Schs.*, 100 F.3d 1281 (7th Cir. 1996).....23

*Caminetti v. United States*, 242 U.S. 470 (1917) .....16

*Cannice v. Norwest Bank Iowa*, 189 F.3d 723 (8th Cir. 1999).....24

*Carlson v. Green*, 446 U.S. 14, 19-23 (1980). .....21

*Cassidy v. Detroit Edison Co.*, 138 F.3d 629 (6th Cir. 1998)..... 13-14

*Cehrs v. Northeast Ohio Alzheimer's Research Center*, 155 F.3d 775 (6th Cir. 1998).....23

*Cravens v. Blue Cross and Blue Shield of Kansas City*, 214 F.3d 1011 (8th Cir. 2000) .....*passim*

*Criado v. IBM Corp.*, 145 F.3d 437 (1st Cir. 1998) ....23, 26

*Dalton v. Subaru-Isuzu*, 141 F.3d 667 (7th Cir. 1998) .....9, 11, 18, 27

*Daugherty v. City of El Paso*, 56 F.3d 695 (5th Cir. 1995).....19, 21

*Davis v. Florida Power & Light Co.*, 205 F.3d 1301 (11th Cir. 2000).....14, 15

*Davis v. Passman*, 442 U.S. 228, 242-48 (1979).....21

*Davoll v. Webb*, 194 F.3d 1116 (10th Cir. 1999) .....10

*Deane v. Poncono Medical Center,* 142 F.3d 138 (3d Cir. 1998) (en banc) .....23

*Deas v. River West,* 152 F.3d 471 (5th Cir. 1998).....8

*Donahue v. Consolidated Rail Corp.,* 224 F.3d 226 (3d Cir. 2000).....24, 28

*Duckett v. Dunlop Tire Corporation,* 120 F.3d 1222 (11th Cir. 1997).....11

*Earl v. Mervyns, Inc.,* 2007 F.3d 1361 (11th Cir. 2000).....28

*Eckles v. Consolidated Rail Corp.,* 94 F.3d 1041 (7th Cir. 1996).....10, 14, 15

*E.E.O.C. v. Humiston-Keeling,* 227 F.3d 1024 (7th Cir. 2000).....11

*E.E.O.C. v. MCI Telecommunications Corp.,* 993 F. Supp. 726 (D. Az. 1998) .....26

*E.E.O.C. v. Sara Lee,* 2001 U.S. App. LEXIS 268 (4th Cir. Jan. 9, 2001) .....*passim*

*Fedro v. Reno,* 21 F.3d 1391 (7th Cir. 1994) .....10

*Feliberty v. Kember Corp.,* 98 F.3d 274 (7th Cir. 1996).....23

*Feliciano v. Rhode Island,* 160 F.3d 780 (1st Cir. 1998).....7, 13

*Firefighters v. Stotts,* 467 U.S. 561 (1984) .....21



*Fjellestad v. Pizza Hut,* 188 F.3d 944 (8th Cir. 1999) .....*passim*

*Foreman v. Babcock & Wilcox Co.,* 117 F.3d 800 (5th Cir. 1997) .....8, 13, 17

*Garcia-Ayala v. Lederle Parenterals,* 212 F.3d 638 (1st Cir. 2000).....10, 17

*Gaul v. Lucent Technologies, Inc.,* 134 F.3d 576 (3rd Cir. 1998).....7

*Gile v. United Airlines,* 213 F.3d 365 (7th Cir. 2000).....10

*Gile v. United Airlines, Inc.,* 95 F.3d 492 (7th Cir. 1996).....8

*Grenier v. Cyanamid Plastics, Inc.,* 70 F.3d 667 (1st Cir. 1995).....23

*Hansen v. Henderson,* 233 F.3d 521 (7th Cir. 2000)...23, 26

*Hendricks-Robinson v. Excel Corp.,* 154 F.3d 685 (7th Cir. 1998) .....9, 10, 23

*Humphrey v. Memorial Hospitals Association,* __F.3d __, 2001 U.S. App. LEXIS 2099 (9th Cir. Feb. 13, 2001) .....25

*Hunt-Golliday v. Metropolitan Water Reclamation District,* 104 F.3d 1004 (7th Cir. 1997).....28

*Jackan v. New York Department of Labor,* 205 F.3d 562 (2d Cir. 2000).....11, 15, 28

*Jacques v. Clean-Up Group, Inc.*, 96 F.3d 506 (1st Cir. 1996).....24, 27

*Kralik v. Durbin*, 130 F.3d 76 (3d Cir. 1997).....13, 15

*Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923).....6

*Loulseged v. Akzo Nobel Inc.*, 178 F.3d 731 (5th Cir. 1999).....23, 28

*Mengine v. Runyon*, 114 F.3d 415 (3rd Cir. 1997).....23, 28

*Miller v. Illinois Department of Corrections*, 107 F.3d 483 (7th Cir. 1997).....23, 28

*Moses v. American Nonwovens*, 97 F.3d 446 (11th Cir. 1996).....24, 28

*Mustafa v. Clark County Sch. District*, 157 F.3d 1169 (9th Cir. 1998) .....26

*Myers v. Hose*, 50 F.3d 278 (4th Cir. 1995).....8, 17

*N.L.R.B. v. Pittsburgh Steamship Co.*, 340 U.S. 498 (1951) .....6

*Norville v. Staten Island University Hospital*, 196 F.3d 89 (2d Cir. 1999).....7, 16

*Pritchard v. Southern Company Services*, 92 F.3d 1130 (11th Cir. 1996).....7

*Rehling v. The City of Chicago*, 207 F.3d 1009 (7th Cir. 2000).....27



*Rice v. Sioux City Memorial Park Cemetary, Inc.*, 349 U.S. 70 (1955).....6

*Ross v. Indiana State Teacher's Association*, 159 F.3d 1001 (7th Cir. 1998).....28

*Rudolph v. United States*, 370 U.S. 269 (1962).....6

*Salanger v. U.S. Air, Inc.*, 611 F. Supp. 427 (N.D. N.Y. 1985) .....20

*Smith v. Midland Brake*, 180 F.3d 1154 (10th Cir. 1999) (en banc) .....*passim*

*Soto-Ocasio v. Federal Express*, 150 F.3d 14 (1st Cir. 1998).....24, 28

*Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508 (1924).....6, 20

*Steffes v. Stepan Company*, 144 F.3d 1070 (7th Cir. 1998).....28

*Steel Workers v. Weber*, 443 U.S. 193 (1979).....21

*Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278 (11th Cir. 1997).....28

*Taylor v. Pepsi-Cola Company*, 196 F.3d 1106 (10th Cir. 1999).....28

*Taylor v. Phonixville Sch. District*, 184 F.3d 296 (3rd Cir. 1999).....23, 26

*Taylor v. The Principal Finance Group*, 93 F.3d 155 (5th Cir. 1996) .....23

*Terrell v. U.S. Air*, 132 F.3d 621 (11th Cir. 1998) .....13

*The Monrosa v. Carbon Black Export Inc.*, 359 U.S. 180 (1959).....6-7

*Trans World Airlines v. Hardison*, 432 U.S. 63 (1977) .....15

*United States v. City and County of Denver*, 943 F. Supp. 1304 (D. Colo. 1996) .....12-13

*Williams v. Channel Master Satellite Systems*, 101 F.3d 346 (4th Cir. 1996).....8, 18

*Willis v. Conopco, Inc.*, 108 F.3d 282 (11th Cir. 1997).....8, 24, 28

*Willis v. Pacific Maritime Association*, 108 F. 3d 282 (9th Cir. 2000) .....14, 15

*Woodman v. Runyon*, 132 F.3d 1330 (10th Cir. 1997).....14

*Wygant v. Jackson Bd. of Educ.*, 476 U.S. 276 (1986).....21

**Statutes and Regulations**

U.S.C.S. Supreme Ct. R. 10.....5

29 U.S.C. § 791(g).....7

29 U.S.C. § 794(d).....7

42 U.S.C. § 1981a.....26



42 U.S.C. § 2000e-2(h).....16

American with Disabilities Act, 42 U.S.C. § 12101, *et. seq.*.....*passim*

42 U.S.C. § 12101(b)(1) .....7

42 U.S.C. § 12111(9)(B).....9

42 U.S.C. § 12111(10)(A) .....16

42 U.S.C. § 12112(b)(5) .....7, 16

29 C.F.R. § 1630.2(p) ..... 16-17

29 C.F.R. § 1630.2(o)(3).....22

Cal. Labor Code § 2922.....20

**Additional Authorities**

S. Rep. No. 116, 101st Cong. 1st Sess. (1989).....22

House Comm. on Educ. & Labor H.R. Rep. No. 485(II), 101st Cong., 2d Sess. (1990) .....7

29 C.F.R. Pt. 1630, App. § 1630.2(o) .....8

E.E.O.C. Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the ADA (March 1, 1999), at 39; *accord* 29 C.F.R. Pt. 1630, App. § 1630.2(o). .....8, 11

2B Sutherland Construction § 51.02 at pp. 200-201 (6th Ed. 2000) .....16

## INTRODUCTION

Respondent Robert Barnett respectfully requests that the Court reject the Petitioner's request for a writ of certiorari for the following reasons: There is no material conflict in the Circuits with regard to the questions presented. As to the first question, the Circuits are in complete agreement that a disabled employee unable to perform the essential functions of the current position may seek a transfer as a reasonable accommodation, so long as the transfer does not directly contravene the bargained-for seniority provisions of a governing collective bargaining agreement. Further, the Circuits are in overwhelming agreement that such a transfer may be an accommodation even when not expressly recognized by the employer's own policies. Recent *dicta* from the Fourth Circuit stands alone in suggesting a *per se* rule against any transfer requiring a modification of an employer's unilaterally adopted seniority policy. Moreover, the Fourth Circuit position will likely be reconciled with the majority view without the intervention or resources of this Court.

As to the second question, the Circuits are in accord that an employer's failure to engage in the interactive process can be considered evidence relevant to whether the employer failed to accommodate the disabled employee. Furthermore, and despite the Petitioner's allusions to the contrary, no Circuit has held that an employer's failure to engage in the interactive process states an independent cause of action. Significantly, the Respondent in this matter has never asserted, nor did the Ninth Circuit find, that the Petitioner's failures with regard to the interactive process constitute a claim regardless of whether a reasonable and effective accommodation was available.

Additionally, the petition's characterizations notwithstanding, the Ninth Circuit simply did not rule that an employer's failure to engage in the interactive process reflexively bars summary judgment. Rather, the Ninth Circuit ruled precisely the same as has every other Circuit which has considered the question: Where the plaintiff has demonstrated that a possible accommodation existed, the employer's failure to engage in the interactive process is to be construed as additional evidence precluding summary judgment. This is only logical and practical, as this additional evidence bars any conclusion as a matter of law that it was the *employee*'s fault that the possible accommodation was not implemented. Certainly, where the plaintiff cannot demonstrate that a possible accommodation existed, the employer's failure to engage will not bar summary judgment on the defendant's behalf.

Finally, and importantly, the Ninth Circuit found disputed issues of fact as to *three* possible reasonable accommodations, only one of which would have required a modification of the Petitioner's seniority policy. Under these circumstances, the Ninth Circuit's decision to reverse summary judgment was clearly proper. Thus, for all of these reasons, the petition should be denied.

## STATEMENT OF THE CASE

The Ninth Circuit Court of Appeals, sitting *en banc*, held that an employer is not automatically entitled to summary judgment merely because the disabled employee sought – among other possible accommodations – a reassignment that required a modification of the employer's unilaterally adopted seniority policy. It concluded that additional evidence is required before such an employer may obtain judgment as a matter of law: "It would seem that the seniority system without more should not bar reassignment.



. . . A per se bar conflicts with the basic premise of the ADA, which grounds accommodation in the individualized needs of the disabled employee and the specific burdens which such accommodation places on an employer." *Barnett v. U.S. Air*, 228 F.3d 1105, 1119-20 (9th Cir. 2000) (en banc). Significantly, the court also found disputed issues of material fact as to whether two other proposed accommodations, not requiring modification of the Petitioner's seniority policy, would have been effective. *Id.* at 1116-17. In light of these specific facts, the court reversed the district court's dismissal of the Respondent's claims. *Id.* at 1122.

As the record establishes, Respondent Barnett successfully worked for the Petitioner U.S. Air for ten years before he became disabled through an on-the-job injury. At that time, Respondent transferred into a mailroom position that effectively accommodated his disability. Two years later, Respondent learned that he would be displaced from this position through the application of Petitioner's seniority policy. This policy was not part of a collective bargaining agreement; rather, it was contained in the 1992 Personnel Policy Guide. Ironically, the Petitioner U.S. Air has argued in past cases that this Personnel Policy Guide creates no legally enforceable rights for employees.[1]

After learning that he would be displaced from his existing position, Respondent contacted the Petitioner in August of 1992 and requested accommodations for his disability, and suggested a modification of the seniority policy to permit him to remain in the mailroom. As noted by

[1] Tellingly, in the oral argument, counsel for the Petitioner was asked more than one dozen times whether the seniority policy created legally enforceable contract rights. At no time did counsel provide an answer to this question. Respondent's Appendix A at 26-29, 31-33, 40-41.

the *en banc* panel, "U.S. Air did not respond to Barnett for five months," and then only "informed Barnett that he would be removed from the mailroom." 228 F.3d at 1109. At that time, the Respondent also suggested special lifting equipment permitting him to perform the functions of a cargo position, or restructuring of the cargo position. A month and a half later, in March of 1993, the Respondent summarily denied any and all of the requested accommodations. "U.S. Air rejected all three of Barnett's proposed reasonable accommodations and offered no practical alternatives. . . . U.S. Air did not seek to have a dialogue with Barnett but instead rejected his proposed accommodations by letter." 228 F.3d at 1116-17.

The court found disputed issues of material fact as to each of the three accommodations requested by the Respondent. First, as to the Respondent's request to remain in the mailroom position, the court declined to accept that the existence of a seniority policy unilaterally adopted by an employer is, without more, a *per se* bar to a reasonable accommodation reassignment. *Id.* at 1120. Instead, the court required a "case-by-case fact intensive analysis" to determine whether reassignment is required by the ADA. *Id.* Here, the court perceived no specific evidence of hardship or disruption. *Id.* Second, the court found that the requested lifting equipment was another "potentially reasonable accommodation." *Id.* at 1116-17. Finally, as to the third requested accommodation, the court found disputed issues of material fact as to whether the proposed job restructuring would have been an appropriate accommodation. *Id.* at 1117.

The court further held that employers who have received a request for accommodation must engage in an interactive process with employees to determine appropriate accommodations. "[W]e join explicitly with the vast



majority of our sister circuits in holding that the interactive process is a mandatory rather than a permissive obligation on the part of employers under the ADA and that this obligation is triggered by an employee or an employee's representative giving notice of the employee's disability and the desire for accommodation." *Id.* at 1114.

In short, the court held, "[t]his is not a case where it is obvious that no modification could enable the employee to perform the essential functions of a job or where the employee has caused the process to break down. Given U.S. Air's failure to engage in the interactive process, liability would be appropriate if a reasonable accommodation would otherwise have been possible. There remains conflicting evidence in the record as to whether a reasonable accommodation without undue hardship to the employer was possible. Thus, a triable issue of fact exists on this issue." *Id.* at 1117.

The court's ruling follows black letter principles of ADA jurisprudence. Where triable evidence exists that any of three proposed accommodations – only one of which would have required a modification of the Petitioner's seniority policy – would have enabled the Respondent to continue working, and that the Petitioner failed to engage in appropriate interaction with the Respondent, it is proper and unremarkable that summary judgment for the employer was reversed. The petition should be denied.

## ARGUMENT

Review on a writ of certiorari is not a matter of right, but of judicial discretion. U.S.C.S. Supreme Ct. R. 10. A petition for a writ of certiorari will be granted only for compelling reasons. *Id.* Petitions for certiorari seeking resolution of a purported conflict in the courts are granted

only "in cases where there is a *real* and embarrassing conflict of opinion and authority between the circuit courts of appeals." *N.L.R.B. v. Pittsburgh Steamship Co.*, 340 U.S. 498, 502 (1951) (quoting *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923)) (emphasis added); *see also Rice v. Sioux City Memorial Park Cemetary, Inc.*, 349 U.S. 70, 74 (1955). No such conflict exists here. There is no holding by another court of appeals that creates any real or intolerable conflict with the decision of the Ninth Circuit. The Circuits are in substantial agreement as to the first question proffered by Petitioner, and the conflicting *dicta* from the Fourth Circuit will certainly be resolved by further development of the case law without the intervention or resources of this Court. Additionally, and contrary to Petitioner's brief, there is no conflict as to the second question. Accordingly, the petition should be rejected.

Moreover, the ruling below found disputed issues of material fact as to two accommodations unrelated to Petitioner's first question. It is plain that a Circuit court may properly find unreviewable and triable issues of fact as to whether lifting equipment or job restructuring would have effectively accommodated an employee. "[I]t is not for this Court to re-examine the evidence, and disturb [the court's] findings." *Rudolph v. United States*, 370 U.S. 269, 278 (1962). Furthermore, Petitioner's brief is disingenuous at best in its discussion at footnote 3 of the Ninth Circuit's plain holding with regard to these additional reasonable accommodations. *See Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508, 509 (1924) ("[W]e have pointed out the necessity for clear, definite and complete disclosures concerning the controversy when applying for certiorari."). As the ruling below was clearly appropriate as to the alternative accommodations, the petition should be denied. *See The Monrosa v. Carbon Black Export Inc.*, 359 U.S. 180, 183 (1959) ("It appears that



in any event the respondent will be able to try its claim in the district court.").

## I. THE CIRCUITS ARE IN SUBSTANTIAL AGREEMENT THAT A DISABLED EMPLOYEE UNABLE TO PERFORM THE ESSENTIAL FUNCTIONS OF THE CURRENT JOB MAY SEEK REASSIGNMENT, EVEN IF THE TRANSFER IS NOT EXPRESSLY PERMITTED BY THE EMPLOYER'S OWN POLICIES.

In enacting the Americans with Disabilities Act of 1990 (ADA), Congress announced its sweeping intention "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). The ADA expressly includes "not making reasonable accommodations to . . . an otherwise qualified individual with a disability" as prohibited employment discrimination. 42 U.S.C. § 12112(b)(5). The right to accommodations is a "key requirement" of the Act. House Comm. on Educ. & Labor, H.R. Rep. No. 485(II), 101st Cong., 2d Sess. 33 (1990). The ADA specifically identifies "reassignment to a vacant position" as a reasonable accommodation. 42 U.S.C. § 12111(9)(B); *cf.* 29 U.S.C. §§ 791(g), 794(d) (reflecting 1992 amendments).

In light of the ADA's express mandate, it is unremarkable that the Circuit courts have universally acknowledged that reassignment must be considered as a possible accommodation for a disabled employee unable to perform the essential functions of the current position.[2] The

---

[2] *Feliciano v. Rhode Island*, 160 F.3d 780, 785-86 (1st Cir. 1998); *Norville v. Staten Island Univ. Hosp.*, 196 F.3d 89, 99 (2d Cir. 1999); *Gaul v. Lucent Technologies, Inc.*, 134 F.3d 576, 580 (3rd Cir. 1998); *E.E.O.C. v. Sara Lee*, 237 F.3d 349 (stating in dicta that even if

*en banc* ruling in *Barnett* only falls into rank with this considerable line of cases. 228 F.3d at 1118.

That a reassignment is a possible reasonable accommodation under the ADA does not create an unfettered right. As clarified by the E.E.O.C. regulations and guidance, reassignment to a vacant position is "the reasonable accommodation of last resort," which need only be considered when an employee is not able to perform the essential functions of his or her job even with accommodations. E.E.O.C. Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the ADA (March 1, 1999), at 39; *accord* 29 C.F.R. Pt. 1630, App. § 1630.2(o); *Aka v. Washington Hospital Center,* 156 F.3d 1284, 1301 (D.C. Cir. 1998) (en banc). An employer need only transfer the employee to a position for which the employee is otherwise qualified. *Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626, 633 (7th Cir. 1998). Further, the employer is not required to "bump" other employees to create a vacancy, or to create a new position for the disabled

---

employee disabled, reassignment required only when position is vacant); *Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800, 811 (5th Cir. 1997), *cert denied,* 522 U.S. 1115 (1998) (noting in dicta that even if employee were disabled, his request for reassignment could not prevail because the proposed transfer would violate the collective bargaining agreement); *Deas v. River West, L.P.*, 152 F.3d 471 (5th Cir. 1998) (noting in dicta that even if employee were disabled, she failed to identify an available position); *Bratten v. SSI Servs.*, 185 F.3d 625, 634 (6th Cir. 1999); *Gile v. United Airlines, Inc.*, 95 F.3d 492, 498 (7th Cir. 1996); *Cravens v. Blue Cross and Blue Shield of Kansas City,* 214 F.3d 1011, 1018 (8th Cir. 2000); *Fjellestad v. Pizza Hut,* 188 F.3d 944, 950 (8th Cir. 1999); *Smith v. Midland Brake,* 180 F.3d 1154, 1167 (10th Cir. 1999) (en banc); *Willis v. Conopco, Inc.*, 108 F.3d 282, 284 (11th Cir. 1997); *Pritchard v. Southern Company Services,* 92 F.3d 1130, 1134 (11th Cir. 1996) (permitting failure to transfer case to go forward); *Aka v. Washington Hospital Center,* 156 F.3d 1284, 1301 (D.C. Cir. 1998) (en banc); *contra. Myers v. Hose,* 50 F.3d 278, 284 (4th Cir. 1995); *but see Williams v. Channel Master Satellite Systems,* 101 F.3d 346, 350 & n.4 (4th Cir. 1996) (recognizing reassignment as possible accommodation).



employee. *Id.* An employer need not convert temporary positions into permanent ones. *Dalton v. Subaru-Isuzu Automotive,* 141 F.3d 667, 680 (7th Cir. 1998); *Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, 697 (7th Cir. 1998). Indeed, the *Barnett* court did not hold otherwise.

The employer is not required to provide the employee with the accommodation or transfer he or she prefers; the employer need only provide some effective accommodation. *Baert,* 149 F.3d 626, 633. "[W]hen an employee requests a transfer as reasonable accommodation and the employer offers alternative reasonable accommodation, which the employee then refuses, the employer cannot be liable for failing to reasonably accommodate the employee by not transferring him to another position." *Gile v. United Airlines,* 95 F.3d 499 (7th Cir. 1996). Finally, an employer need not provide a transfer that imposes an undue hardship. 42 U.S.C. § 12112(b)(5)(A). *Barnett* is in accord. 228 F.3d at 1120.

### A. There is No Material Dispute that Modification of an Employer's Transfer Policy May Be a Reasonable Accommodation.

The Petitioner asserts that the ADA can never require a deviation from an employer's own "nondiscriminatory" policies, and that this "principle" has been adopted by the "virtually all circuits." Brief at p. 17. This statement is misleading and plainly wrong. "[A]djustment or modification of . . . policies" is expressly listed as a possible accommodation in the ADA. 42 U.S.C. § 12111(9)(B).[3]

---

[3] Notably, the "principle" against policy modification asserted by the Petitioner would eviscerate the statutory duty to provide reasonable accommodation. *See Smith v. Midland Brake,* 180 F.3d at 1176. Any accommodation could be deemed subject to the employer's voluntarily adopted policies and therefore unavailing to the requesting employee.

An overwhelming majority of Circuit courts have endorsed such modifications. These cases are legion: *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 646 (1st Cir. 2000) ("The company's apparent position that the ADA can never impose an obligation on a company to grant an accommodation beyond the leave allowed under the company's own leave policy is flatly wrong under our precedent."); *Fedro v. Reno*, 21 F.3d 1391, 1396 (7th Cir. 1994) ("reasonable accommodation may even include a requirement that an employer alter existing policies or procedures that it would not change for nonhandicapped employees"); *Eckles v. Consolidated Rail Corp.*, 94 F.3d 1041, 1051-52 (7th Cir. 1996) (provisions of union contract may be modified so long as modification does not implicate collectively-bargained seniority rights); *Hendricks-Robinson*, 154 F.3d at 694-700 (defendant's medical layoff and reinstatement policy which excluded certain vacant jobs, and which required "physical fitness" for new positions, did not meet accommodation obligation); *Gile v. United Airlines*, 213 F.3d 365, 374 (7th Cir. 2000) (employee not required to comply with United's bidding and competitive transfer procedures) *Beck v. Univ. of Wis.*, 75 F.3d 1130, 1135 (7th Cir. 1996) ("employer must be willing to consider making changes in its ordinary work rules, facilities, terms, and conditions"); *Cravens v. Blue Cross and Blue Shield*, 214 F.3d 1011, 1020-21 (8th Cir. 2000) (employer's internal application procedure insufficient to provide accommodation to employee who requested assistance in locating job within the company); *Davoll v. Webb*, 194 F.3d 1116, 1134 (10th Cir. 1999) (duty to reassign disabled police officers required modification of employer's policy against transferring

---

Fortunately, there is no need for the Court to clarify this basic analysis, as the *en banc* panel properly ruled in *Barnett* that the employer's policy could be modified to effectuate an effective accommodation. 228 F.3d at 1118-20.



officers to Career Service positions, and employer's request for jury instruction that ADA simply requires equal treatment was properly denied – "An employer's policy that does not provide accommodations for non-disabled workers . . . will not excuse the employer's failure to reasonably accommodate disabled workers.").[4]

Of particular note are the *en banc* panels of the Tenth and D.C. Circuits. These courts recognize the plain language of the statute by holding that the accommodation duty is not limited to simply making available existing policies of the employer, but may require adjustments to these policies:

> [I]f the ADA requires [the employer] to reassign [the employee], and [the employer] has the power to make the reassignment without violating the CBA rights of its other employees, [the employer] must make the reassignment, and may not refuse to do so on the

---

[4] *See also* E.E.O.C. Guidance at 41 ("If an employer has a policy prohibiting transfers, it would have to modify that policy in order to reassign an employee with a disability, unless it could show undue hardship."); *Jackan v. New York State Dep't of Labor*, 205 F.3d 562, 565 (2d Cir. 2000) (refusing to affirm the trial court on the grounds that the civil service rules in effect would have prohibited the plaintiff's transfer, and instead affirming on other grounds; *cf. Duckett v. Dunlop Tire Corporation*, 120 F.3d 1222, 1225 (11th Cir. 1997) (court cited employer's policy against transfers from management to production line, but also noted that reassignment was barred by applicable collective bargaining agreement and that plaintiff testified that he was unable to work at all); *E.E.O.C. v. Humiston-Keeling, Inc.*, 227 F.3d 1024, 1028-29 (7th Cir. 2000) (anti-discrimination laws may require employers to change policies adopted for non-discriminatory reasons, but employer not required to deviate from "consistent and honest" policy of selecting best candidate for vacancy); *Dalton*, 141 F.3d at 679-680 (discussing in dicta concept of "legitimate nondiscriminatory prerequisites," and concluding that employer not required to convert temporary, "light duty" positions available persons with on-the-job injuries to permanent positions for persons with disabilities).

> grounds that it subjectively judges the CBA's standard not to be satisfied. . . .
>
> [T]he word 'reassign' must mean more than allowing an employee to apply for a job on the same basis as anyone else. . . . Numerous courts have assumed that the reassignment obligation means something more than treating a disabled employee like any other job applicant.

*Aka,* 156 F.3d at 1303 n.25, 1304.

> [I]f the reassignment language merely requires employer to consider on an equal basis with all other applicants an otherwise qualified existing employee with a disability for reassignment to a vacant position, that language would add nothing to the obligation not to discriminate, and would thereby be redundant. . . . [T]he reassignment obligation must mean something more than merely allowing a disabled person to compete equally with the rest of the world for a vacant position.
>
> [O]ther policies of an employer might have to be subordinated to an employer's reassignment obligation under the ADA because to do otherwise would essentially vitiate the employer's express statutory obligation.

*Smith,* 180 F.3d at 1164-65, 1176; *see also United States v. City and County of Denver,* 943 F. Supp. 1304, 1310 (D. Colo. 1996) ("If reassignment is only required where a reassignment policy already exists for all employees, there



would be no need for the ADA to provide that it be available for people with disabilities.").[5]

Indeed, the plain wording of the statute belies the Petitioner's stance, and the *en banc* ruling below merely joins this long and properly decided line of cases. "[A] modification in workplace policy can be a reasonable accommodation, absent undue hardship." *Barnett,* 228 F.3d at 1117-18. The employer's "seniority system without more should not bar reassignment." *Id.*

### B. The Only Exception That Has Developed in the Case Law is When the Requested Transfer is Barred by an Applicable Collective Bargaining Agreement; Even Then, Such Agreements Are Scrutinized Closely to Determine Whether Any Provision in the Agreement Would Permit the Transfer.

Concerning situations not pertinent here, Circuit courts have constructed an exception to the right to a reasonable accommodation transfer where the sought-after vacancy is subject to the seniority provisions of a collective bargaining agreement, and permitting the disabled employee to fill the vacancy would conflict with the bargained-for seniority rights of other employees. *Feliciano,* 160 F.3d at 786-87; *Kralik v. Durbin,* 130 F.3d 76, 79 (3d Cir. 1997); *Foreman,* 117 F.3d at 810; *Cassidy v. Detroit Edison Co.,*

---

[5] Modifications permitting an employee to transfer to a vacant position and thereby avoid job loss and unemployment are not the "preferential treatment" critiqued in *Terrell v. U.S. Air,* 132 F.3d 621, 627 (11th Cir. 1998). In that case, the plaintiff sought a transfer to a particular, part-time position, despite the fact that no such vacancy existed as all of those jobs had been eliminated. The court noted that the plaintiff's argument would give her a job while all similarly situated persons would be unemployed. The *Barnett* decision does not conflict with this conclusion.

138 F.3d 629, 634 (6th Cir. 1998); *Eckles*, 94 F.3d at 1051; *Benson v. Northwest Airlines*, 62 F.3d 1108, 1114 (8th Cir. 1995); *Willis v. Pacific Maritime Ass'n*, 236 F.3d 1160, 1162 (9th Cir. 2001), *petition for reh'g filed* (Jan. 30, 2001); *Aldrich v. Boeing Co.*, 146 F.3d 1265, 1271 n.5 (10th Cir. 1998); *Davis v. Florida Power & Light Co.*, 205 F.3d 1301, 1306-07 (11th Cir. 2000). Under these cases, CBA seniority rights have a special status, as they, like accommodation rights, are protected by federal statutes. *Eckles*, 94 F.3d at 1045. Accordingly, disabled employees who seek reassignment into a position, but who are not next in line for the job under the union contract, are in effect asking to "bump" other employees who are contractually entitled to the position. Because a reasonable accommodation can not bump another, nondisabled employee, this type of transfer is not permitted. There is no conflict with these cases presented here.

However, at the same time, the courts of appeal have attempted to reconcile union contracts with an employer's statutory duty to accommodate, and therefore they closely scrutinize collective bargaining agreements to determine whether any provision permits the reassignment. *See, e.g.*, *Kralik*, 130 F.3d at 81, 83 (transfer might be reasonable accommodation if union waives objection); *Buckingham v. United States*, 998 F.2d 735, 741 (9th Cir. 1993) (transferring employee with HIV would not violate union agreement which permitted exceptions for "unusual circumstances"); *Willis v. Pacific Maritime Association*, 236 F.3d at 1162 (rule that reassignment in violation of CBA not required by ADA "is only applicable where there is a direct conflict between the proposed accommodation and the collectively-bargained seniority rights of other employees"); *Woodman v. Runyon*, 132 F.3d 1330, 1347 (10th Cir. 1997) (reassignment is reasonable accommodation where not expressly prohibited by collective bargaining agreement);



*Aka*, 156 F.3d at 1303 ("an interpretation of [CBA] section 14.5 which allows WHC to implement its ADA obligations is distinctly preferred"); *accord Jackson v. New York Dep't of Labor*, 205 F.3d 562 (2d Cir. 2000) (concluding that provision in civil service rules permitted reasonable accommodation transfers); *Eckles*, 94 F.3d at 1052 (limiting holding to collectively bargained seniority rights, and expressly declining to find that all provisions found in collective bargaining agreements take precedence over the ADA duty to reasonably accommodate.)

The Petitioner baldly asserts on page 16 that there is no basis for distinguishing between a seniority system established by a collective bargaining agreement and an employer's voluntarily adopted seniority policy. This is not the case. In virtually every decision discussing the interaction between the accommodation duties required by the ADA and the seniority rights established by collective bargaining agreements, the stated rationale for the exception relies upon the special nature of collectively bargained seniority rights as protected by federal laws. "Collective bargaining, aimed at effecting workable and enforceable agreements between management and labor, lies at the core of our national labor policy, and seniority provisions are universally included in these contracts." *Eckles*, 94 F.3d at 1048 (quoting *Trans World Airlines v. Hardison*, 432 U.S. 63, 79 (1977)). In the words of the Third, Seventh, and Eleventh Circuits, these rights have "a pre-existing special status in the law." *Kralik*, 130 F.3d at 82; *Eckles*, 94 F.3d at 1052; *Davis*, 205 F.3d at 1307. As the Ninth Circuit has recently concluded, "[w]e are persuaded that it would be improper to subject an employer to the Hobson's choice of violating the ADA or the NLRA, or at least subjecting itself to the threat of litigation under these statutes." *Willis*, 236 F.3d at 1162.

By contrast, an employer's unilaterally adopted seniority policy creates no federally protected rights for any of its employees. Often such policies create no legal rights at all, whether under state or federal law. Moreover, they can be withdrawn at any time.

### C. Neither the Recent *Dicta* in *E.E.O.C. v. Sara Lee Corporation* Nor the 1997 *Obiter Dicta* in Foreman Justify this Court's Intervention.

There is no language in the ADA exempting employers that have adopted seniority policies from the duty to provide reasonable accommodation. "[T]he meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917). Congress was capable of drafting an exception for seniority systems, as it did in Title VII, *see* 42 U.S.C. § 2000e-2(h)(2000), but chose not to do so. "[W]here a statute, with reference to one subject contains a given provision, the omission of such a provision from a similar statute is significant to show that a different intention existed." 2B Sutherland Construction § 51.02 at pp. 200-201 (6th Ed. 2000).

Thus, where an employee has demonstrated that no accommodation will permit continuation in the current job, and there is the existence of a funded, vacant position for which the employee is qualified, then the only statutory defense is whether the proposed transfer would impose an undue hardship. 42 U.S.C. § 12112(b)(5)(A)(2000); *Norville v. Staten Island Univ. Hosp.*, 196 F.3d 89, 99 (2d Cir. 1999). "Undue hardship" is an action requiring significant difficulty or expense, with reference to the statutory and regulatory factors. 42 U.S.C. § 12111(10)(A)(2000); 29 C.F.R. §



1630.2(p). "Undue hardships are not limited to financial impacts; the term includes accommodations that are unduly extensive, substantially disruptive, or that would fundamentally alter the nature or operation of the business." *Garcia-Ayala*, 212 F.3d at 650.

In support of its request for certiorari, the Petitioner relies heavily on the recent Fourth Circuit ruling in *E.E.O.C. v. Sara Lee Corp.*, 237 F.3d 349 (4th Cir. 2001). In *Sara Lee*, the court of appeals suggested, in *dicta*, a *per se* rule against transfers not authorized by the employer's seniority policy. *Id.* at 354-55 (even if employee disabled, she is not entitled to reassignment that would supercede employer's seniority system); *see also Foreman*, 117 F.3d at 810 (even if employee disabled, employer not required to provide reassignment in violation of rights of other employees under collective bargaining agreement, and "even if there were no CBA in place," employer not required to provide reassignment). Despite the apparent conflict suggested by the Fourth Circuit *dicta*, the dispute is rhetorical rather than real: *dicta* simply does not create an intolerable conflict, and further case law is likely to reconcile any differences.[6] The attention of the Court is not necessary.

#### 1. Further Development of the Case Law Will Likely Resolve Any Differences Between the Case-by-Case Analysis Used by Most Circuits and the Fourth Circuit's *Dicta* Suggesting a *Per Se* Rule.

---

[6] The Fourth Circuit was alone in its 1995 ruling that an employer need not reassign an employee who is unable to meet the demands of his or her present position. *Myers v. Hose*, 50 F.3d at 284. One year later, that Circuit recognized the error in its ways and stepped back from its solitary position. *See Williams v. Channel Master Satellite Systems*, 101 F.3d at 350 n. 4 (4th Cir. 1996). As that Circuit has already demonstrated its ability to reconcile its internal conflicts, there is no need for this Court to intervene.

As the Tenth Circuit has explained, also in *dicta*, under particular facts a requested accommodation may amount to a fundamental alteration of the employer's business and is therefore not mandated by the ADA. Such facts might include "a well entrenched seniority system which, even though not rooted in a collective bargaining agreement, is so well established that it gives rise to legitimate expectations by other, more senior employees to a job that the disabled employee might desire." *Smith v. Midland Brake, Inc.*, 180 F.3d at 1176.

Under those circumstances, "[r]equiring an employer to disrupt and violate any such well-established reasonable expectations of seniority rights in order to favor a disabled employee in a job reassignment could, *at least under some circumstances*, constitute a fundamental and unreasonable alteration in the nature of the employer's business." *Id.* (emphasis added). However, the mere adoption of a policy is not enough: "An employer cannot, of course, convert its responsibility to look into a 'broad range' of jobs into a 'narrow band' simply by adopting a 'no transfer' policy." *Id.* at 1176 (quoting *Dalton*, 141 F.3d at 679).

Appropriately, the Tenth Circuit's ruling proposes a case-by-case, fact-specific analysis of whether a particular employment policy, including a non-collectively bargained seniority policy, can bar a reasonable accommodation transfer. The *Barnett* ruling endorses a similar case-by-case analysis. "[A] seniority system is a factor in the undue hardship analysis. A case-by-case fact intensive analysis is required to determine whether any particular reassignment would constitute an undue hardship to the employer." 228 F.3d at 1120. Such an individualized analysis substantially



reconciles the Fourth Circuit's *dicta* in *E.E.O.C. v. Sara Lee* with the overwhelming majority view.[7]

2. Here, Unlike the Seniority Policy Discussed in *Sara Lee*, the Employer's Policy Had Been Unilaterally Modified to Assign Vacancies Regardless of Seniority, and Created No Contract Rights; Additionally, the Employer Presented No Specific Evidence That Permitting Mr. Barnett to Remain in the Position Would Be Disruptive.

Under the approach outlined by both *Smith* and *Barnett*, the nature and terms of an employer's seniority policy would be facts relevant to whether a reassignment in violation of the policy would constitute an undue hardship. One important factor is whether the seniority policy creates legally enforceable rights, as do collective bargaining agreements, and the corresponding possibility of litigation. Alteration of such a policy under these circumstances may impose undue hardship. For example, the Fifth Circuit has noted that a reassignment in violation of a legally enforceable city charter would constitute an undue hardship. *Daugherty*, 56 F.3d at 699-700.

Similar considerations were highlighted in the *Sara Lee* case. "To mandate that a company exempt workers from

---

[7] The establishment of any *per se* rules barring or authorizing a transfer is antithetical to the structure and design of the ADA, which favors case-by-case determinations. Contrary to the repeated mischaracterizations found in Petitioner's brief, *see* pages 11, 14 and 15, the Ninth Circuit's ruling in *Barnett* did not create a *per se* rule that reassignment is always required. Indeed, the opinion specifically rejected any *per se* rule one way or the other. 228 F.3d at 1120 ("We hold that reassignment is a reasonable accommodation and that a seniority system is not a *per se* bar to reassignment. However, a seniority system is a factor in the undue hardship analysis.").

this long-standing policy would disrupt the legitimate expectations of Sara Lee's longtime employees. It could potentially expose the company to the threat of lawsuits by disgruntled employees who were placed behind employees in need of accommodation." 237 F.3d at 355 (noting possible claim of breach of implied contract based on employer's policy).

In stark contrast, Petitioner's seniority policy creates no legally enforceable rights for U.S. Air's employees. Cal. Labor Code § 2922 (California employees presumed "at will"); Respondent's Appendix at 26-29, 31-33, 40-41; *Bouzianis v. U.S. Air, Inc.*, No. 84-3798-K, 1985 U.S. Dist. LEXIS 15470, at *5 (D. Mass. Sept. 30, 1985) (U.S. Air successfully argued that "personnel policy guide" did not create enforceable contract); *Salanger v. U.S. Air, Inc.*, 611 F. Supp. 427 (N.D. N.Y. 1985) (same). Petitioner's footnote 6, stating that "[e]mployer-initiated policies, like collective bargaining agreements, frequently create legal rights," is remarkably contradictory to U.S. Air's own stated position that its policy does not create contract rights.[8]

Another relevant factor is whether the policy has been maintained in the same form over time, or if it has been unilaterally amended by the employer. In the *Sara Lee* case, the court noted that "Sara Lee has maintained [its] policy for at least thirty years, and it has been in its present form for the last fifteen years." 237 F.3d at 354. In the seniority policy considered here, the Petitioner U.S. Air unilaterally amended its seniority policy in 1993 – three years after th[illegible] amendment

[8] Indeed, judicial estoppel should preclude the petition being granted. Judicial estoppel "prevents a party from asserting a factual position in a legal proceeding that is contrary to a position previously taken by [the party] in a prior legal proceeding." *Bridgeway Corp. v. Citibank*, 201 F.3d 134, 141 (2d Cir. 2000). It is so here, and the petition should thus be denied. *See Southern Power Co.*, 263 U.S. at 509.



of the ADA – by adding an exception for persons with catastrophic illness or with family members with catastrophic illness. *Barnett*, 228 F.3d at 1121 n.11; Respondent's Appendix B at 1-2.

Also consistent with a case-by-case analysis would be any factual evidence of disruption that likely would be caused by the proposed reassignment.[9] In this matter, the Petitioner has presented no evidence of disruption. To the contrary, Mr. Barnett had successfully worked in his mailroom position for two years with no identified hardship to the defendant. *Barnett*, 228 F.3d at 1120-21. Moreover, Mr. Barnett had more than a decade's worth of faithful service, became disabled in the course and scope of this service, and was then subjected to an employer's discretionary policy that operated to foreclose entirely a critical accommodation. The disruption to his expectations was severe, and the result was not the loss of a desired shift or assignment, but the loss of his job.[10]

[9] In *Daugherty*, the city's director of personnel not that plaintiff, a part-time employee with only nine months of service, would supercede a full-time employee with five years of service who had been waiting and preparing for the position. 56 F.3d at 699. Similarly, in *Sara Lee*, the court noted that the person filling the vacancy sought by the plaintiff had 20 years more seniority, and was displaced because a plant had closed.

[10] Persons with disabilities who can no longer perform their current positions face imminent job loss, and not similarly situated to their non-disabled co-workers who seek a transfer. This court has determined that the denial of a possible future employment opportunity does not present the same concern as the loss of an existing position. *See, e.g., Wygant v. Jackan Bd. of Educ.*, 476 U.S. 276, 282-83 (1986); *Firefighters v. Stotts*, 467 U.S. 561, 574-76 (1984); *Steel Workers v. Weber*, 443 U.S. 193, 208 (1979). While Petitioner emphasizes its concern for the expectations of its nondisabled workers, Respondent holds a concurrent expectation that his federal rights will be recognized and effectively enforced. *Cf. Bell v. Hood*, 327 U.S. 678, 684 (1946); *Davis v. Passman*, 442 U.S. 228, 242-48 (1979); *Carlson v. Green*, 446 U.S. 14, 19-23 (1980).

Under the prevailing case-by-case analysis adopted by the Ninth Circuit below, some factual record that included an employer's seniority policy might well support a finding of undue hardship or fundamental alteration, such that reassignment was not appropriate or required. However, the Ninth Circuit concluded as it may that on this record, triable issues remain. The petition should be rejected.

## II. THERE IS NO CONFLICT IN THE CIRCUITS REGARDING THE LEGAL SIGNIFICANCE OF AN EMPLOYER'S FAILURE TO ENGAGE IN AN INTERACTIVE PROCESS WITH ITS DISABLED EMPLOYEE: THE CIRCUITS AGREE THAT SUCH A FAILURE HAS NO INDEPENDENT LEGAL SIGNIFICANCE, BUT IS RELEVANT EVIDENCE OF AN EMPLOYER'S FAILURE TO ACCOMMODATE.

"[T]he reasonable accommodation requirement is best understood as a process in which barriers to a particular individual's equal employment opportunity are removed." S. Rep. No. 116 101st Cong. 1st Sess. 33 (1989). "To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation." 29 C.F.R. § 1630.2(o)(3). "A problem-solving approach should be used to identify . . . possible accommodations that will result in a meaningful equal opportunity for the individual with a disability." S. Rep. No. 116 at 33.

The employer's participation is critical, particularly where the most suitable accommodation may be reassignment. This is because the employee usually possesses incomplete, and often inaccurate, information



about the options available, including the existence of appropriate vacancies. *See, e.g., Mengine v. Runyon,* 114 F.3d 415, 420 (3rd Cir. 1997); *Taylor v. Phoenixville Sch. Dist.,* 184 F.3d 296, 316 (3rd Cir. 1999); *Bultemeyer v. Fort Wayne Community Sch.s,* 100 F.3d 1281, 1285-86 (7th Cir. 1996); *Miller v. Illinois Dep't of Corrections,* 107 F.3d 483, 486-87 (7th Cir. 1997); *Smith,* 180 F.3d at 1173; *Aka,* 156 F.3d at 1304 n.27.

The overwhelming majority of circuits have stated that once an employee requests accommodation, the ADA imposes an obligation upon both sides to engage in an interactive process to identify and implement an effective accommodation.[11] "Once an employer knows of an employee's disability and the employee has requested reasonable accommodations, the ADA and its implementing regulations require that the parties engage in an interactive process to determine what precise accommodations are necessary." *Beck,* 75 F.3d at 1137. At least one circuit has opined that the process, while advised, is not mandated. *Moses v. American Nonwovens, Inc.,* 97 F.3d 446, 448 (11th Cir. 1996).[12] However, regardless of whether or not the interactive process is characterized as required or advised,

---

[11] *Grenier v. Cyanamid Plastics, Inc.,* 70 F.3d 667, 677 (1st Cir. 1995); *Criado v. IBM Corp.,* 145 F.3d 437, 444 (1st Cir. 1998); *Mengine, supra* at 419; *Taylor v. Phoenixville Sch. Dist.* 184 F.3d at 312-313, 317; *Taylor v. Principal Financial Group, Inc.,* 93 F.3d 155, 165 (5th Cir. 1996); *Loulseged v. Akzo Nobel Inc.,* 178 F.3d 731, 735-36 (5th Cir. 1999); *Cehrs v. Northeast Ohio Alzheimer's Research Center,* 155 F.3d 775, 783-784 (6th Cir. 1998); *Hansen v. Henderson,* 233 F.3d 521, 523 (7th Cir. 2000); *Hendricks-Robinson,* 154 F.3d at 693; *Beck,* 75 F.3d at 1135-1136; *Feliberty v. Kember Corp.,* 98 F.3d 274, 280 (7th Cir. 1996); *Bultemeyer,* 100 F.3d at 1285-1286; *Fjellestad,* 188 F.3d at 952; *Smith,* 180 F.3d at 1172.

[12] The interactive process is also endorsed as an inexpensive form of mediation designed to avoid litigation. *Deane v. Pocono Medical Center,* 142 F.3d 138, 149 (3d Cir. 1998) (en banc); *Taylor v. Phoenixville Sch. Dist.,* 184 F.3d at 316 n.6.

the identifiable rules regarding this issue are identical throughout the Circuits.

**A. While an Employer's Failure to Engage in the Interactive Process May Be Evidence Relevant to the Question of Whether the Employer Failed to Provide Accommodation, No Circuit Has Held that an Employer's Failure to Engage Constitutes an Independent Basis of Liability.**

The courts are unanimous that an employer's failure to engage in the interactive process may be evidence relevant to the question of whether the employer failed to provide accommodation. *See, e.g.*, cases cited in footnote 11, *ante*. However, no court – including the Ninth Circuit in this case – has held that an employer's failure to engage constitutes an independent basis of liability. Rather, those courts which have considered the question directly have expressly rejected any separate cause of action for an employer's failure to engage. *See, e.g., Soto-Ocasio v. Federal Express,* 150 F.3d 14, 19 (1st Cir. 1998) (plaintiff's assertion that employer failed to engage in meaningful interaction "is of no moment" where plaintiff not qualified); *accord Donahue v. Consol. Rail Corp.,* 224 F.3d 226, 234-35 (3d Cir. 2000); *Rehling v. The City of Chicago,* 207 F.3d 1009, 1015-16 (7th Cir. 2000); *Cravens,* 214 F.3d at 1021; *Cannice v. Norwest Bank Iowa,* 189 F.3d 723, 727 (8th Cir. 1999); *Fjellestad,* 188 F.3d at 952; *Willis v. Conopco, Inc.,* 108 F.3d at 285; *Moses,* 97 F.3d at 448; *see also Jacques v. Clean-Up Group, Inc.,* 96 F.3d 506, 513 (1st Cir. 1996) (upholding jury verdict against employee on failure to accommodate despite plaintiff's allegations of employer's failure to engage).[13]

[13] Moreover, Respondent did not claim failure to engage in the interactive process as a separate cause of action regardless of possible accommodation, nor is this a case where Respondent has failed to identify a possible accommodation.



Thus, the Petitioner's brief is again incorrect on page 22, where it suggests that there is a conflict among the circuits as to whether an employer's failure to engage can constitute an independent violation. There is no such conflict.[14]

**B. The Opinion in *Barnett* Joins Several Circuits Noting That Where a Plaintiff Has Identified a Possible Accommodation, *and* Presents Evidence that the Employer Failed to Engage in an Interactive Process, Summary Judgment is Inappropriate.**

The Court in *Barnett* ruled that where the plaintiff presented evidence of the employer's failure to engage in the interactive process despite the employee's request, and the presence of a possible effective accommodation, summary judgment is inappropriate. "We hold that employers, who fail to engage in the interactive process in good faith, face liability for the remedies imposed by the statute *if a reasonable accommodation would have been possible.* We further hold that an employer cannot prevail at the summary judgment stage if there is a genuine dispute as to whether the employer engaged in good faith in the interactive process." 228 F.3d at 1116 (emphasis added); *Humphrey v. Memorial Hospitals Association,* 2001 U.S. App. LEXIS 2099, at *32 (9th Cir. Feb. 13, 2001) ("Given MHA's failure to engage in the interactive process, liability is appropriate if a reasonable accommodation without undue hardship to the employer would otherwise have been possible," citing *Barnett.*

[14] The various judicial references to "split[s]" and "conflicts" cited by the Petitioner have undoubtedly created a perception of divergent views. A closer examination, however, reveals that the substantive analysis is consistent throughout the Circuits, as described herein.

This ruling concurs with decisions from several other Circuits which have held that summary judgment is inappropriate where the disabled employee has shown that the employer did not make a good faith effort to assist the employee in seeking accommodation, *and* that the employee could have been reasonably accommodated but for the employer's lack of good faith efforts to accommodate. *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d at 318-319; *Cravens*, 214 F.3d at 1021; *Fjellestad*, 188 F.3d at 952; *see also Criado*, 145 F.3d at 444 (1st Cir. 1998).[15]

An employee who cannot demonstrate a possible accommodation does not benefit from the rule: "The employee still carries the burden of showing that a particular accommodation . . . would have made the employee qualified to perform the essential functions of the job." *Fjellestad*, 188 F.3d at 954 (citing *Taylor v. Phoenixville Sch.*); *see also Barnett*, 228 F.3d at 1113 n.3 (plaintiff "bears the initial burden of showing that the suggested accommodation would, more probably than not, have resulted in his ability to perform the essential functions of his job") (citing *Mustafa v. Clark County Sch. Dist.*, 157 F.3d 1169, 1176 (9th Cir. 1998), and at 1116 (citing *Fjellestad* and *Taylor v. Phoenixville Sch.*); *Hansen v. Henderson*, 233 F.3d 521, 523 (7th Cir. 2000). The Petitioner's brief neglects to mention this key requirement.

As the Seventh Circuit recently explained, in those cases precluding summary judgment, the claims were "[not] based solely on the employer's failure to engage"; instead, the courts "found potential liability based on an employer's

[15] The Petitioner's argument that 42 U.S.C. § 1981a somehow demonstrates a Congressional intent that courts must disregard the interactive process during the liability phase of litigation has been implicitly rejected. *E.E.O.C. v. MCI Telecommunications Corp.*, 993 F. Supp. 726 n.10 (D. Az. 1998).



failure to engage in an interactive process in circumstances where the plaintiff alleged that the result of that breakdown was the employer's failure to provide a reasonable accommodation." *Rehling v. City of Chicago*, 207 F.3d 1009, 1016 (7th Cir. 2000); *see also Baert*, 149 F.3d at 634 (summary judgment improper where plaintiff identified potential vacancies, and produced evidence disputing who was responsible for the breakdown in the interactive process); *Dalton*, 141 F.3d at 677 (summary judgment improper where plaintiffs offered evidence of possible accommodations, and of the employer's failure to engage).[16] Under these circumstances, there are simply disputed material questions of fact regarding whether the employer failed to accommodate the employee.

While not every Circuit has considered the question, none has ruled that summary judgment is somehow appropriate where a plaintiff has presented evidence both of possible accommodation and of the employer's failure to engage. Accordingly, there is no conflict requiring this Court's attention.

[16] Similarly, where the plaintiff proves at trial that the interactive process would have made the difference, the employer faces liability. *Jacques*, 96 F.3d at 515 ("There may well be situations in which the employer's failure to engage in an informal interactive process would constitute a failure to provide reasonable accommodation that amounts to a violation of the ADA."). The Petitioner's characterization of the 1996 *Jacques dicta* in footnote 10 is unpersuasive. The *Jacques* panel considered a plaintiff's appeal of a jury verdict, and concluded that there was no discrimination as a matter of law for the defendant's purported failure to engage, because the jury could have reasonably concluded that any such failure did not cause a failure to accommodate, in that there was evidence that the proposed transportation accommodation was not necessary and the proposed scheduling accommodation would eliminate an essential function. In light of that context, the *dicta* only means that liability may attach for failure to accommodate where – unlike under the facts as determined by the jury in *Jacques* – the failure to engage would have made the difference.

### C. There is No Conflict Among the Circuits that Summary Judgment May Be Granted Against an ADA Plaintiff Where No Possible Accommodation Has Been Identified, Regardless of Whether There is Evidence that the Employer Failed to Engage.

There is no conflict among the Circuits that summary judgment may be granted against an ADA plaintiff where no possible accommodation has been identified, regardless of whether there is admissible evidence that the employer failed to engage in the interactive process. *Soto-Ocasio,* 150 F.3d at 19 (failure to engage "of no moment" where plaintiff undisputable not qualified); *accord Mengine,* 114 F.3d at 420-21; *Donahue,* 224 F.3d at 234; *Taylor v. Pepsi-Cola Company,* 196 F.3d 1106, 1110 (10th Cir. 1999); *Willis v. Conopco, Inc.,* 108 F.3d at 285; *Moses,* 97 F.3d at 448; *Earl v. Mervyns, Inc.,* 207 F.3d 1361, 1366-67 (11th Cir. 2000);[17] *see also Jackan,* 205 F.3d at 566 (plaintiff bears burden of providing that an accommodation exists that permits her to perform the job's essential functions); *Allen v. Rapides Parish Sch. Board*, 204 F.3d 619, 622 (5th Cir. 2000) (employer's failure to engage does not create liability where employer provided reasonable accommodation).

---

[17] Conversely, summary judgment against an ADA plaintiff may be appropriate where it is undisputed that the plaintiff caused the breakdown in the interactive process. *See Loulseged,* 178 F.3d at 740; *Beck*, 75 F.3d at 1136; *Ross v. Indiana State Teacher's Association,* 159 F.3d 1001, 1016 (7th Cir. 1998); *Steffes v. Stepan Company,* 144 F.3d 1070, 1072 (7th Cir. 1998); *Stewart v. Happy Herman's Cheshire Bridge, Inc.,* 117 F.3d 1278, 1286-87 (11th Cir. 1997); *see also Miller,* 107 F.3d at 486 (summary judgment affirmed where plaintiff stated she was not interested in vacant positions for which she was qualified); *Hunt-Golliday v. Metropolitan Water Reclamation Dist.,* 104 F.3d 1004, 1013 (7th Cir. 1997) (summary judgment affirmed where plaintiff failed to request accommodation). There is no conflict among the Circuits as to this principle.



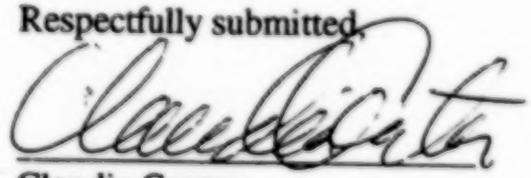
Thus, the Petitioner's brief is again incorrect at page 22, where it suggests that there is conflict among the circuits as to whether an employer's failure to engage at the time of the events in question eliminates the plaintiff's subsequent burden, during litigation, to identify and establish a possible accommodation that would have effectively permitted the plaintiff to perform the position's essential functions. No court of appeals has so held, and there is no such conflict.[18] The en banc opinion in *Barnett* certainly does not create such a conflict: the plaintiff in this matter established multiple possible effective accommodations.

## CONCLUSION

There is no real conflict as to the questions presented, and there are additional and unreviewable grounds for the lower court's decision. For all of the reasons stated herein, the petition should be denied.

Dated: March 3, 2001

Respectfully submitted,



Claudia Center
Counsel of Record
For Respondent
Robert Barnett

---

[18] Contrary to the Petitioner's brief at page 9, the ruling below did not eliminate the plaintiff's burden of demonstrating a possible accommodation; the discussion cited related to the burdens of the parties at the time that the employee requests accommodation. In that context, "it would make little sense to insist that the employee must have arrived at the end product of the interactive process before the employer has a duty to participate in that process." *Barnett,* 228 F.3d at 1113. The same passage cites *Buckingham,* 998 F.2d at 740 and *Mustafa,* 157 F.3d at 1176 for the proposition that the plaintiff bears the burden during litigation of showing possible accommodation. 228 F.3d at 1113 n.3.

# APPENDIX

**APPENDIX A**

**In the United States Court of Appeals**
**for the Ninth Circuit, Sitting *En Banc***
June 22, 2000
Reporter's Transcript of Proceeding
(from official audiotape)

THE COURT: So ladies and gentlemen, time set for the hearing of Barnett vs. [unintelligible] for employment opportunity information and U.S. Air. The EEOC is amicus curiae [unintelligible] party. Let's hear from the appellants.

MR. WHITEMAN: Good morning, distinguished Chief Judge and distinguished circuit judges. May it please the Court. I am Bob Whiteman, and I represent Mr. Bob Barnett, the plaintiff appellant in this case.

THE COURT: I should mention -- sorry, I would have [unintelligible] -- that we have two of our judges who are joining us on the telephone. Judge Gregorson and Judge Fletcher. And I, before we start I want to make sure that they are with us.

JUDGE FLETCHER: Well I'm here, Judge Fletcher. And I can hear everything.

THE COURT: All right. Judge Gregorson? Not here.

A MALE VOICE: Harry, where are you?

THE COURT: You can be seated if you like. You don't have to stand until we get the connect. We had -- we had both judges on hold. Something happened.

A MALE VOICE: We were here for [unintelligible].

THE COURT: Mr. Clerk, I presume we do have someone that's going to be reconnecting us?

THE. CLERK: Yes.

THE COURT: Judge Gregorson?

A MALE VOICE: [Unintelligible].

JUDGE FLETCHER: Judge [unintelligible]?

THE COURT: Yes, Judge Fletcher.

JUDGE FLETCHER: We're back, I think.

THE COURT: Judge Gregorson, are you with us?

JUDGE GREGORSON: I'm back.

THE COURT: All right. Good. All right, we'll proceed to hear from the appellant.

MR. WHITEMAN: Thank you, Your Honor.

The appellant is urging that the matter be reversed and remanded for three essential reasons.

Number one, that the case in its present configuration by the decision of the appellate majority panel is tantamount to applying a per se rule of exclusion for seniority systems, bounded by seniority systems, and linking them directly with the same level of per se analysis totally attributable only to collective bargaining agreements where there are contractual rights.

Secondly the appellant urges that the case as it presently stands allows a company to completely disregard any responsibility for engaging in an interactive process.

And thirdly, I do believe that because of the various illustrations in the record of modified disputes of essential facts in the motion for summary judgment, that this case now represents a destructive position regarding the high bar that this court has normally reserved for employment discrimination cases.

It is clear that when the appellant in this case established through his affidavits and declarations what occurred chronologically that he met all of the three elements required for a case under the ADA as he brought it. In particular, it was undisputed at the trial level that for purposes of the summary judgment, Mr. Barnett was in fact a qualified disabled employee.



Then we enter into a completely unrealistic examination of what is a reasonable accommodation. Reasonable accommodation cannot be an absolute accommodation, but the case concluded that no matter what Mr. Barnett would recommend to the company, the company could merely hold its hands, disregard any obligations it had to examine, to confer, to participate, and simply exclude him under the shield of this unilateral seniority policy. It was not a bargained-for seniority policy.

THE COURT: Why does that make a difference?

MR. WHITEMAN: It makes a difference because if it is not a bargained-for seniority policy, but unilateral, that means the company is required to participate in the interactive process. If it's not a seniority policy where there's contractual rights, and the company can unilaterally make changes to it, all the more reason why it should participate in reasonable accommodation.

It should enter into a way to find a way to keep the employee working. The important --

A MALE VOICE: It seems to me you may be interchanging two different concepts there. You've got the association part off to one side, and it seems to me that maybe there's some overlap here. As I understand it, nine circuits have held that there is no requirement to trump the seniority system in these kinds of cases.

MR. WHITEMAN: Well, we have many words that are used that are akin to a collective bargaining environment. Comments like "trump" might do a lot of things. There's no question but what the legislation requires employers to do something, and the something may very well have an effect where I'm going to adverse another employee.

A MALE VOICE: I'm just following up on the Chief Judge's question, which I think is quite pertinent here. Why should the fact that the seniority system, which is in effect, adopted by the company and followed so far as we know

completely, why should that make any difference that it is a company-imposed rather than a collectively-bargained plan? The -- in terms of the company operation it shouldn't make any difference.

MR. WHITEMAN: Well, it does make a difference, because number one, it's unilateral. In a collective bargaining situation the two are dissimilar in the sense that there are no absolute rights that the employees have that they have contracted for.

A MALE VOICE: What does absolute mean as compared to rights? I mean the other side tells us that this seniority system does create rights enforceable in court.

MR. WHITEMAN: Well, I don't know. It's been argued in the brief that U.S. Air was successfully argued in another case a few years ago that their personnel policy guide does not create any rights in the employees. They successfully urged that.

So I think if you look at it, we have to realize that personnel policies, if they're unilateral, as admittedly it was in this case, even though they say, please follow it, it is not absolute because if they wanted to add a position, they did, as they did in April of 1993.

If they want to set up the category, they do so, and it is not contracted work, as they did with the emergency or catastrophic illness policy.

If they want to change things, they can do so because Barnett, you'll recall, only represented a mere 5 percent of this particular work element of the Cargo Department. He's one employee. And when he bids, he doesn't bid like a collective bargaining unit, he bids for himself. He bids for shift and base [unintelligible] and the supervisor assigns specific duties.

So in that sense it's not the same as the kind of policy where we're worried that, gee, now the ADA comes



in, we've got these clear rights that are contracted for and somehow we're going to go trump them.

A FEMALE VOICE: Well, Counsel, one thing that's a little different here that is like collective bargaining, different from other cases. It is like a collective bargaining agreement, is that they're -- in established seniority system, there's someone else who otherwise would -- would rely on getting a position by virtue of seniority. So that this -- so that your client, in effect you're arguing, would bump someone else.

And what I'm wondering is, are there any cases under this statute that suggest that bumping someone else is -- must be done by the employer for it to be a reasonable accommodation?

MR. WHITEMAN: The cases that I'm aware of have prohibited that only when it flows out of a collective bargaining agreement where there are contracted rights. The [unintelligible] and so forth say, well, if you've got one of those, that there's nothing in the ADA that we can see that mandates we can allow bumping.

On the other hand, bumping or taking another position, is very interesting when applied to this case because there are so many other alternatives that the company refused to participate in. He wanted to stay. He didn't want to bump anybody.

And they says: Well, we decided now we're going to open it up for bid and you have to go.

He's there for two years doing the same thing. Then they say gratuitously: Well, we created another position for you for five months. That's part of our, quote, you know, interactive process or reasonable accommodation.

It meant nothing of the kind. He just happened to stay there.

In addition to that, when Mr. Barnett asked for consideration for a couple of other reasonable things. And

then I want to mention here is something that really -- I think it's important for the whole effectiveness of the ADA. And that is it's a vehicle to make adjustments to retain skilled workers.

He's got ten years in the company, so he's got rights and U.S. Air's going to deal with him in the California version of good faith [unintelligible] dealing. He's going to have an opportunity to suggest; they're going to have an opportunity to participate.

They say: No. If you want expert equipment or something, we summarily say that if you use the word "robotic," we're going to claim that that's somehow high tech, too expensive, and we can't afford it.

A MALE VOICE: Is he still an employee of the company?

MR. WHITEMAN: He is not.

THE COURT: You hesitate.

MR. WHITEMAN: Well, it's a categorization problem. He doesn't get paid and he doesn't get any benefits, and he's in like a limbo status where he has --

A MALE VOICE: The other side says he's still an employee and he hasn't exercised his opportunities to bid on any other jobs, and that when asked if he would move to another station he said no.

MR. WHITEMAN: That is -- that is incorrect, Your Honor, and the record -- the record clearly says that before he got this famous -- I don't know how the panel characterized it -- but this request to go to a meeting on January 20th of 1993, where he was informed that he was out for three days. Two days before, he had bid for a job in the Cargo Department.

Now they're not listening to his request for assistance and to find an accommodation. They're simply saying, you want to go back there, but your doctor says you have a



lifting restriction. We're not going to examine that. You can't go back there.

He bid before he was kicked out. And when less senior people were there. So he tried to use the system, too, and they just says, no, you can't do that.

A MALE VOICE: Well, was he asked if he was willing to go to another station and did he say no through counsel?

MR. WHITEMAN: No, that is absolutely incorrect, and he met that in his declaration.

And here's what occurred very simply: He was characterized by the attorney for the corporation, Mr. Comb, saying he had heard an out-of-court statement that he was trying to incorporate in his statement as being factual that somehow the EEOC officer talked to Barnett, and Barnett says, well, I don't want to go anywhere and I won't go anywhere. And that is not true. And he met that with his declaration.

Otherwise --

A MALE VOICE: Is this -- I'm sorry. Is this case like *Buckingham* in your view?

MR. WHITEMAN: I don't know if it's quite like *Buckingham* because it's a new situation where we have to show through reasonable efforts to take an employee who has identified specific accommodations in a so-called seniority system that's unilateral, and he has to be met with some kind of an effort on the part of the company. He must have some kind of an effort. We say that the reciprocity was not there.

A MALE VOICE: Well, if I remember *Buckingham* correctly it said the seniority system in that case was different because it accommodated various options, and so it's not a locked-in seniority system.

And I sort of take your argument here as saying because this isn't bargained-for in a collective bargaining

setting, that it's open to the company to do what it wants with the system. And it's kind of like *Buckingham's* seniority system, isn't it?

MR. WHITEMAN: But in *Buckingham*, the *Buckingham* case stands for a narrow proposition that I would worry about for the effectiveness of the ADA being implemented to this extent. That if you've got a seniority system, and even if it's unilateral like we have, then a company like U.S. Air would say: Well, *Buckingham* says, unless can show me a lot of exceptions, then you can't even come in and get assistance under ADA in a unilateral situation.

So *Buckingham* -- I would not want this court in these western states to say: You've got to have a seniority system with the most exceptions and then we'll let you vindicate your rights under ADA. I don't think that's -- that's too narrow.

A MALE VOICE: What's the rule? We have to write a rule that people can follow out there in the real world of employers and employees. What's the rule that you would have us write in connection with the ADA and seniority systems?

MR. WHITEMAN: I think if the seniority system is unilateral, like it is here, because obviously if this case continues to go against Barnett, then companies are going to come up with all kinds of, quote, seniority policies, and they'll have to worry about ADA any more.

But here's what I would like. I would require the same stricture for having a qualified injury. I would write the same stricture for having the disabled employee identify. He's able to do that. Keep the onus on him as part of his case. Identify, and make it specific.

If it's reasonably specific, that's kind of like a trior of fact problem, I understand, then have the company be under responsibility for communication.



And we've got so many badges of circumstantial evidence here --

A MALE VOICE: But what's the rule on seniority systems? How do they play in -- in the process? The unilateral, they're out. You don't pay any attention to them at all?

MR. WHITEMAN: No. With seniority systems -- even what --

A MALE VOICE: It sounds to me that you just said even if it's a seniority system, that if it's unilateral, you don't pay any attention to it at all. Did I hear you wrong?

MR. WHITEMAN: Well by distinguishing a seniority system imposed by the company alone and a seniority system --

A MALE VOICE: Yeah, and that's what I'm asking about. I'm asking about.

MR. WHITEMAN: -- and a seniority system that's part of a CBA.

A MALE VOICE: We're not talking about CBAs now. There's no CBA here. But the rule that I'm hearing you asking -- that I hear you asking for is one that says you can disregard the seniority system all together so long as it's unilaterally imposed. Is that the rule that you're asking?

MR. WHITEMAN: No, that is not the rule I'm asking for, because if a seniority system has, who knows what kind, and there are many variations of seniority systems. It may be possible to do the variety of accommodations that are indicated in the law for job restructuring, a different kind of reassignment part time; there's a whole range of solutions to that.

A MALE VOICE: So you're saying if there's a seniority system that has within it an accommodation for something like this, then you have to use it.

But what if there's one that says we do all of these things based on seniority. That's it, over and out. You're

asking us to disregard that in connection with the AD -- to say that's irrelevant in connection with the ADA.

MR. WHITEMAN: If it's a unilateral system I would say, yes.

A MALE VOICE: Okay, that's --

THE COURT: Counsel -- excuse me.

JUDGE GREGORSON: This is Judge Gregorson. Let me ask you a question, Counsel.

Have you thought about whether the existence of the unilateral seniority system ought to be a factor to consider in the reasonableness of the accommodation offered by the employer? Have you thought about that?

MR. WHITEMAN: Yes. Yes, because reasonable as far as I'm aware in the ADA confidential plan, reasonable is not an absolute. So some consideration should have to bear on the company's attitude toward reasonable --

JUDGE GREGORSON: But what you're -- if I understand what you're saying is if you've got a collective bargaining agreement, then the employee -- and the employee is represented through the union -- and the employer --they've agreed on a deal.

And some of those collective bargaining agreements I understand do have provisions for disabled employees. That's something the employees collectively have agreed to.

But if you have a -- a system that's just created by the employer, and that system doesn't have that type of accommodation in it for disabled employees, then the -- that pure unilateral system, that doesn't provide for an accommodation, would then be a factor to consider in the reasonableness equation? Is that what you're saying?

MR. WHITEMAN: I think it would be a factor, but that's why this case illustrates the extreme difficulty of being able to ascertain what's taking place by the appellate level when there is no duty to communicate and participate --



JUDGE GREGORSON: Let me ask you this: Was discovery taken here?

MR. WHITEMAN: Discovery was taken. It was not closed. And all of the conflicted facts as indicated in our briefs were adjudicated against the appellant.

JUDGE GREGORSON: So you mean you went to summary judgment and you hadn't completed discovery?

MR. WHITEMAN: Correct.

JUDGE GREGORSON: Did you point that out to the trial judge?

MR. WHITEMAN: In our briefing, I believe -- or in our argument I believe we did.

JUDGE GREGORSON: Did you say: Your Honor, can we have a continuance? We haven't completed our discovery.

JUDGE FLETCHER: This is Judge Fletcher speaking. If I understand this standard, accommodations are to be adjusted and tried to be worked out. And only if the employer finds that it's an undue hardship does he not have to give the job placement or the accommodation. So it seems to me one needs to think about hardship.

MR. WHITEMAN: Hardship generally follows after there's an attempted reasonable accommodation, but even if hardship is claimed, in contrast to what Oliver Lawrence, who was responsible for the whole program said, I thought they ruled it out immediately without an analysis on hardship.

If hardship is claimed, it must be proven by specifics depending on the size of the company, the resources available, and so forth. It was not done in this case. Yet they claimed hardship and the court so found.

A MALE VOICE: Could you clarify what standard the plaintiff has to meet here? Because I -- now I'm confused.

The panel opinion says that the plaintiff must be able to point to at least one specific reasonable accommodation that was available to the employer. Do you quarrel with that?

MR. WHITEMAN: No, absolutely not.

A MALE VOICE: So you think that's in a -- that states the prima facie burden that they have to meet.

MR. WHITEMAN: Part of it, yes, sir. He did three, and all were rejected.

A MALE VOICE: But he has to -- he has to identify -- because the EEOC talks about a plausible alternative. You're -- you're comfortable with the formulation that's in the panel opinion?

MR. WHITEMAN: A reasonable accommodation. And I believe that's adjudicated by a trior of fact if there's a dispute.

A MALE VOICE: The direct link --

MR. WHITEMAN: And the reserve --

A MALE VOICE: I don't know how much -- just a minute. I don't know how much time we have left, but at some point, I think you ought to address this *Thompson vs. Holy Family Hospital*. And frankly, I don't think your supplemental brief on that was very strong. And if you can't get by *Thompson*, your client's not qualified under the ADA; he's not disabled.

MR. WHITEMAN: May I respectfully reserve that for my rebuttal?

A MALE VOICE: Fine.

MS. STAR: May it please the Court. My name is Susan Star. I represent the Equal Employment Opportunity Commission as amicus.

The American's With Disabilities Act does more than require competition on an equal basis. It mandates equal opportunity by requiring employers to take the affirmative step of removing barriers to employment for



persons with disabilities. So that what results is a level playing field.

The weight barriers are to be removed through accommodation.

A MALE VOICE: How do you measure level? I mean the other sides tells us "level" means you take the seniority system and that's part of the leveling factor that you have to look at.

MS. STAR: Congress made clear that accommodations is a modification in either the workplace or in workplace policies. A seniority system is not -- Congress did not make a distinction among seniority systems versus any other employer policy. That's the track of the Title VII in the ADEA.

In both of those statutes Congress said, it specifically said, in the legislative -- in the language, that bona fide seniority systems are excepted --

A MALE VOICE: Yeah, that's true, but what do you --

MS. STAR: -- in the prohibitions of both statutes.

A MALE VOICE: That's right, but what do you do with the Rehabilitation Act of 1973? It seems that Congress with the ADA said that the Rehabilitation Act should pretty much track -- the ADA should pretty much track the Rehabilitation Act.

In all the cases that I can find, pretty much shove seniority -- say seniority systems trump all the other concerns.

MS. STAR: The Rehabilitation -- in the Rehabilitation Act, that changed. Parts of the ADA, the Rehabilitation Act, did not -- did not just reassign them as one of your reasonable accommodations.

And you're right, that is how the courts interpreted that. Once the ADA was enacted, Congress amended the Rehabilitation Act to provide the reasonable

accommodations for -- I'm sorry, for reassignment as one of the reasonable accommodations.

And so post-1992 approximately, when Congress made that alteration, the case law on Rehabilitation Act is consistent with the ADA.

A MALE VOICE: How do you --

MS. STAR: I agree with you --

A MALE VOICE: How do you -- how do you think a seniority system should be handled in this precise context? Ignored or become a factor?

MS. STAR: Your Honor, that's the Commissions -- one of the primary problems we have with the panel decision. It's the allocation of burdens.

A seniority system certainly should be considered. But it should be considered under the prong of undue hardship.

It is the employer's burden to demonstrate that a seniority system -- the alteration of the seniority system would be so destructive on the workforce and in the workplace as to create an undue hardship.

If they can do that, then they do not have to make an exception to that seniority policy.

A MALE VOICE: It seems that everybody is being -- is left at sea by that test, though.

If I'm the practicing lawyer and companies and unions and everybody comes to me, or nonunion people come to me and they say, how do we handle this? You know, if these things -- if they turn into a factor, it seems everything ends up in a court, because there isn't sufficient guidance so that you can determine how to handle these things.

MS. STAR: I understand the dilemma. Congress said that this has to be a case-by-case system.

A MALE VOICE: You mean everything is going to have to go to court?



MS. STAR: What? What? [Unintelligible].

A MALE VOICE: You see my problem? There has to be some guidance out there when you call these things "a factor." What kind of "a factor"?

So the company says, all right, we've taken into consideration as a factor. We have a seniority system and it's going to zoo it up, so we're not going to make this accommodation.

The other side says, here we go to court.

Because "a factor," what do you do with that? Always take it to a trior of fact, to a judge?

MS. STAR: The nature of undue hardship is to dem -- is for an [unintelligible] to demonstrate with concrete evidence that undue hardship wouldn't result.

Congress wanted modifi --

An employer is responsible to make a reasonable accommodation. Failure to make a reasonable accommodation is discrimination under the Americans With Disabilities Act.

A MALE VOICE: Okay, let's take this case.

MS. STAR: Okay.

A MALE VOICE: Let's say the seniority system is a factor.

MS. STAR: Right.

A MALE VOICE: How do you work this case through then regarding this seniority system as a factor?

MS. STAR: That's the problem. Because U.S. Air utterly failed to meet its burden on undue hardship, there is absolutely no concrete evidence in this record as to how -- how this could put --

A MALE VOICE: They say -- they say -- they say it's an undue hardship because you're taking at least one employee who has seniority rights and telling that employee, you don't get what you're entitled to based on the long-

standing policies of the company. They say, there it is. That's the hardship.

MS. STAR: Your Honor, they only pointed to the long-stand -- the only concrete evidence -- that's -- that's hypoth -- that's not concrete.

The only concrete evidence they pointed to is that it is a long-standing policy.

For example, we don't know how many people over which Barnett would have to jump in order to remain in the mail room position.

A MALE VOICE: So one is not enough, but twenty --

MS. STAR: It's a way, Your Honor.

A MALE VOICE: Every time you have a single person, though, I guess you're only going to have one person displaced in a seniority system. So it's always going to be only one person. And it sounds like you're telling me that never can only one person be a hardship or a problem.

MS. STAR: I -- I don't think that that's necessarily the case.

A MALE VOICE: Well, when could the displacement --

MS. STAR: For example --

A MALE VOICE: -- of one person be a problem, then?

MS. STAR: Okay. If you have a situation in which you have a 45-year employee. He has a sterling record. And he's been waiting for a position to open up for years. Then you have somebody that's come in and maybe he's worked one year, and they are an okay performer, not a great performer. They need an accommodation and they want that position, that position that this person who has sterling qualifications has waited for years and years and years for.

That situation under those facts, it seems to me that an employer can certainly prove undue hardship because the



disruption on the workplace of something like that. Once this information got out --

A MALE VOICE: It's a hardship to the person, then that becomes involved, not the hardship to the workplace or the employer.

MS. STAR: No, it's to the workplace, Your Honor, because what I'm suggesting with that example is that once that information got out to the workforce, that this person who has been such a sterling performer for 35 years is not getting his position that he's been waiting for because this mediocre performer that just was employed six months previously is getting that position --

A MALE VOICE: So if the workplace --

MS. STAR: You look to the --

A MALE VOICE: -- if the workplace raises hell and all the employees turn out and start picketing and threatening --

MS. STAR: I don't think it would have to go --

A MALE VOICE: -- then that becomes a hardship?

MS. STAR: Your Honor, Congress, as it defines unreasonable accommodations, looked also to destruction in the workforce. Again, is it a burden? Is it a burden on the employer to -- to provide a reasonable accommodation to alter workplace policies?

A MALE VOICE: Counsel --

MS. STAR: But, Your Honor could view allowing an individual to have a parking space closer to the building than anyone else as a preference under the panel's decision.

A MALE VOICE: Counsel --

MS. STAR: Because everybody would want to be able to park closer to the job.

THE COURT: You might stop for a minute and let some questions --

A MALE VOICE: Okay. Counsel, I'm just wondering whether this court has not already spoken in

[unintelligible] on this very matter. Now it is a Title VII case and the issue was religious accommodation. But in *Valent vs. Carson City* the Court held that such an accommodation need only be made short of interfering with the city's seniority system and with no more than a diminimous cost to the city. And that was a non-CBA environment.

Haven't we already established that we have to recognize a seniority system and follow it?

MS. STAR: Your Honor, seniority -- the reasonable accommodation in Title VII is dramatically different than the reasonable accommodation provision in the ADA.

In the legislative history, Congress specifically rejected the diminimous test of undue hardship. And the reason that it is --

A MALE VOICE: I'm focusing on the seniority system aspect. That's been the focus of this entire discussion so far.

MS. STAR: But the preface -- yes, I understand that, Your Honor, but the preface of that statement that you have read from is that it would -- all the employer has to show is diminimous harm.

A MALE VOICE: No, no. Short of interfering with the city's seniority system.

In other words, the Court held in that case that one should not -- that one was not required -- the employer was not required to change its seniority system for the accommodation there.

And I grant you it's Title VII. But aren't the principles pretty comparable?

MS. STAR: No, they're not comparable, because what it takes to prove an undue hardship under Title VII is dramatically different than what it takes to prove a hardship under the ADA.



Under Title VII all you have to prove is a diminimous harm. All the employer would have to show is barely some hardship. And then they don't have to make an exception to their seniority policy. That is dramatically different.

Congress specifically rejected that kind of approach to undue hardship in enacting ADA.

A MALE VOICE: Well what about the qualified definition? Is the employee qualified if he doesn't have enough seniority?

MS. STAR: No, Your Honor. In the recent case of this court it, in *[unintelligible] vs. [unintelligible]* this court said that to measure the ability to do the job is what -- the definition of what qualification is the ability to do a job, and that the standards must go to job performance.

In fact Congress made it very clear in the legislative history that an expanse of the interpretation of the work qualifications is exactly what's led to the kind of discrimination against individuals with disabilities that the ADA was enacted to fight against.

A MALE VOICE: Counsel, does it matter if the seniority system is contractual or not, even if it's not a collective bargaining agreement. But apart from that, does it matter whether this unilaterally-established seniority system creates contractual rights in the other employees?

And is that established in this record, or is that something that would have to be proven at a trial to establish undue hardship?

MS. STAR: Your Honor, those kind of contractual rights which state law claims and the federal claim with the Americans With Disabilities Act would preempt them. So --

And I do also want to make it clear that the Commission's position is that there isn't that much of a difference between a seniority system embodied in a

collective bargaining agreement and one outside of a collective bargaining agreement.

The court [unintelligible] said that there is a difference have pointed to the fact that a seniority systems outside of a collective bargaining agreements are unilaterally imposed and that within the seniority system you're dealing with legal rights.

A MALE VOICE: Well, why does that make -- excuse me. Why does that make a difference, to follow up on Judge Gould's question.

MS. STAR: Yes.

A MALE VOICE: It seems to me that maybe the unilateral rights question isn't particularly relevant. That the question is, do you force the employer to violate someone's legal rights, either contractually, implied in contracts, or by virtue of a collective bargaining agreement?

So doesn't the real question here come down to the nature of the seniority system? In other words, if it's an informal custom, that's one thing. If it's part of a collective bargaining agreement, it's another. If it's part of a contract, it's yet another obligation.

MS. STAR: Well, I would like to point the Court's attention to *Sarah Jacobs vs. United Airlines*. It's this panel's -- this court's decision. In which it said that there is this inevitable tension between the ADA and the collective bargaining agreements.

A MALE VOICE: Well, what's the answer to Judge Thomas's question?

MS. STAR: What -- the answer is that --

A MALE VOICE: I mean, you seem to be saying that seniority rights can be trumped regardless of the circumstances.

Now it seems to me that there -- it really depends not on the nature of the disability or the employee or the nature of the exception, but rather the nature of the obligation that



the company either assumes or has imposed on it in terms of a seniority system.

MS. STAR: We are not saying that seniority systems are automatically trumped at all. What we're saying is that's the employer's burden. Whether it's in a collective bargaining agreement; whether it's outside of a collective bargaining agreement; whether or not there's a contract; whether or not it's loosely formed. All of that goes to undue hardship.

I would assume that the more -- when you have a collective bargaining agreement, then it might be easier to prove undue hardship than in a situation where it's you have a seniority system that's kind of loosely based.

A MALE VOICE: But along the logic of this --

MS. STAR: But again it's the employee's burden.

A MALE VOICE: It's not [unintelligible], but the logic of the collective bargaining agreement cases seems to be that we don't want to force employers to violate another federal law. So you start with that end of the continuum.

So then you move down it. Do we want to force employers to violate someone's contract rights?

MS. STAR: Yeah, but those are state rights that if --

A MALE VOICE: Then you're saying, yes, that's --

MS. STAR: There's tranche out -- yes, federal rights [unintelligible] state rights. The state rights sometimes are preempted.

And the Commission's position on the federal rights is the position of this Court, which is that the ADA rights are not subject to the rights under a collective bargaining agreement.

And the Commission proposes that the union and the employer, both of which are covered entities under the ADA, and are required to abide by its provisions, get together and agree to a variance of that collective bargaining agreement

so as to not put the employer and the union in this kind of awkward Catch-22 position, which I can see exists.

A MALE VOICE: Counsel, can I just ask whether you agree with counsel that the definition of the plaintiff's burden as set forth in the panel opinion is acceptable to the EEOC or not?

MS. STAR: The definition is acceptable. It's the application that's not. Because it said that to prove reasonable [unintelligible], an employee has to show that it would not unreasonably burden the employer. That is incorrect. That's the employer's burden.

Thank you.

THE COURT: Okay, Counsel.

A MALE VOICE: We'll give the couple of moments to respond.

MR. THOMAS: Good Morning, Your Honors. May it please the Court, my name is Random Thomas, and I represent U.S. Air, now U.S. Airways, in this matter.

And the discussion has been interesting so far. I think we've hit on the main issues before the Court.

There are really two: Whether or not there's an independent violation of the ADA by failing to engage in -- sufficiently in an interactive process.

And understand that the facts in this case are not that the employer refused to do so or would not do so. What we're really talking about is whether or not it was done to the satisfaction of the appellant in this case. There's no question but that process was engaged in.

The question is are we going to create a right, a cause of action, independent of actually -- of actual violation of the ADA for engaging in an insufficient interactive process. Did the employer react too fast? Did it take the employer too long? Was the letter long enough that was responded to?

In this particular case, there was lots of interaction. There were -- there were communications from the plaintiff,



from the appellant's lawyer, from several of appellant's doctors. These went to people at the corporate offices. They went to local management. They went to people in the workers' compensation side of things. There was lots of interaction over many months.

The problem is, in the end, is that the appellant was not happy with the result that was reached. And our position on the interactive process is simply that it should not and cannot become an independent violation disconnected completely from the actual existence of a reasonable accommodation.

In this case after full discovery the appellant was never in our view able to point to an actual -- the existence of an actual accommodation that was reasonable.

JUDGE GREGORSON: This is Judge Gregorson. Let me just interrupt for a moment.

So, I gather from what you're saying is that you agree that the employer is required to engage in an interactive process. Is that right?

MR. THOMAS: Well, if -- you mean when you're using the word "required" means that it somehow the --

JUDGE GREGORSON: Well that the ADA requires the employer to engage in an interactive process. The employer just can't say: Get lost. I don't want to talk to you. Don't bother me.

MR. THOMAS: Well, I think actually the ADA does not require where you're at pain of violating the law to engage in an interactive process.

What I -- our main point is if at the end of the day the appellant or the employee cannot actually point to a specific accommodation that was reasonable, after full discovery, which they have in this case, then the fact that there was no interactive process engaged in, or in the appellant's view, as is applicable here, it was somehow insufficient or unsatisfactory, that we should not be litigating as a separate

violation the satisfactory-ness of that process. But actually we --

JUDGE GREGORSON: But isn't whether the employer engage in -- engages in an interactive process, isn't that a factor to consider in determining whether there was a reasonable accommodation or an effort made for a reasonable accommodation?

MR. THOMAS: Well, in almost -- in every case that I'm aware of that has discussed the interactive process and faulted an employer, it was always, always coupled with a finding by the court that there was an -- actually was an accommodation that could have been made.

In my view an employer acts at its peril when it doesn't engage in that process because it could well miss an accommodation that is indeed reasonable.

JUDGE GREGORSON: Let me ask you this: So your position is that the employer doesn't have to sit down with the employee face to face and talk about what would or would not be a reasonable accommodation.

MR. THOMAS: I don't think that's a requirement of the law, but again, I think an employer acts at its peril when it doesn't have that type of dialog, and we certainly did have that in this particular case.

JUDGE GREGORSON: You would have face-to-face meetings between the employer and the employee?

MR. THOMAS: Well, again, that occurred in this case. I would not say as a -- as a prac -- as a legal matter --

JUDGE GREGORSON: I mean, that occurred in this case that there were face-to-face meetings?

MR. THOMAS: There were definitely face-to-face meetings. There were many meetings. There were -- there was lots of communication. There were many, many players involved in this dialog that went on for many months.

A MALE VOICE: Counsel, to follow up on Judge Gregorson's question. It seems that there's a



regulation at 29 CFR, Appendix 1630.9 that describes an interactive process, including analyzing a particular job in determining essential functions, consulting with the individual with a disability to assess what they can do and what might be a reasonable accommodation, and identifying potential accommodations, and considering the person's preferences, and so on. I'm not going to read the whole reg. I'm sure you're familiar with it.

But first, was that a process consistent with that regulation engaged in here?

MR. THOMAS: All of that was done. But I want to make clear that the regulation actually uses the word "may."

A MALE VOICE: Well, it says "may -- it may be necessary." So it has the word "necessary" in it.

And I was impressed with Judge Fletcher's dissent, pointing why "may be necessary" cannot possibly be a totally permissive standard. If it has the word "necessary" in it, doesn't that suggest that there are situations where -- where it's a requirement?

MR. THOMAS: Well, I think in the case -- I think in the end, no, not if there is no reasonable accommodation at the end of the road to be identified, and which is what our view is of this particular case.

But I do want to emphasize, and in this particular case we believe we did engage in all of those steps. Maybe not to the satisfaction of the appellant, but we engaged in them.

And that's what I'm most concerned about with this issue. Are we going to have a due process laden, very structured, technically-driven type of requirement, where we're simply going to be having litigation in the federal courts about the interactive process and how it was done, and not really focusing on whether or not there was an accommodation that was available and reasonable that this individual should or should not have had.

A MALE VOICE: Well, turning -- turning to that, I want to ask you a question that I didn't get a complete answer from the government on that you may be familiar with the record. Is it absolutely clear in this record that the seniority system is contractual in the sense that if a person were moved to accommodate Mr. Barnett, that that person's legal rights would be violated?

Because as we know, sometimes unilateral systems policies create contract obligations, and other times they don't. What's the situation here? Has there been a record made on that?

MR. THOMAS: Well, I think what the record is clear on is that this particular seniority system has been in place for decades. And the word "unilateral" has been thrown around a lot here. I don't believe it is unilateral.

A MALE VOICE: Okay. But decades doesn't necessarily mean contractual. I don't -- so I'm asking you: Is it contractual or is it not contractual? And is there any truth to the argument of appellant that U.S. Air has taken the position in other litigation that its personnel policies are not contractual?

MR. THOMAS: I am unaware of what appellant's counsel is referring to on that particular point.

I would say as an employment lawyer who defends employers all the time, I can tell you that many many cases are brought based on a lot less than a written policy such as this alleging that, first of all it is an express contract, and certainly an implied contract.

I think the real key thing here is though, it isn't unilateral. Employees come to work. They trust in the system. They work year after year.

A MALE VOICE: Okay. I understand, but -- and I don't mean to interrupt you. But it's my last point. It sounds to me like from what you're saying that that record does not establish, that it has not been adjudicated or



determined or stipulated that this seniority system is contractual as to all the employees. That's the point I'm trying to address.

MR. THOMAS: I think what the Court found was that to deviate from this established system would violate the legitimate rights and expectations of Mr. Barnett's fellow employees.

A MALE VOICE: Where did the Court find that?

MR. THOMAS: When it found that -- when it found that there was no -- there was -- it would not be reasonable -- it would not be a reasonable accommodation to depart from the seniority system.

A MALE VOICE: Well, you're reading an awful lot into that by saying the Court concluded that it was a right -- contractual right that would be violated, aren't you?

MR. THOMAS: No, I think what I said was, I think that the Court found that it would violate the legitimate rights and expectations of employees --

A MALE VOICE: Well, when you say legitimate rights, do you equate that with legally enforceable rights?

MR. THOMAS: I certainly have been involved in many cases trying to defend employers for a lot less.

A MALE VOICE: Well, how does that square with the catastrophic --

A MALE VOICE: [Unintelligible] position usually is that those cases are with out merit. I'm asking you in your opinion, your position, are they legally enforceable rights?

MR. THOMAS: I think an employee could certainly file --

A MALE VOICE: I'm asking you your position. Is it the company's position that their rights arising from the seniority system are legally enforceable by the employee?

MR. THOMAS: I think that we have an obligation to enforce the rights and expectations created by this system.

A MALE VOICE: How does that square with the catastrophic medical policy adopted by U.S. Air that says, if you're awarded a catastrophic medical transfer you will receive a position in your desired location regardless of your seniority date? What's the history and application of that?

MR. THOMAS: Well, it just -- as it says, there is some limited exceptions, which the employees are all aware of, and they are part of the system --

A MALE VOICE: Who put that system in place?

MR. THOMAS: The company did to react --

A MALE VOICE: And what was the employees' participation?

MR. THOMAS: I -- I have no idea of that.

A MALE VOICE: So U.S. Air was able to upset the [unintelligible] expectations under its decades-old policy by putting that in without breaching somebody's contact rights?

MR. THOMAS: Well, I --

A MALE VOICE: Implied contracts rights.

MR. THOMAS: Since there is no record on when that first went in, I couldn't tell the panel or the en [unintelligible] court why or when that went in. All we know is that the particular exception that everybody is aware of, and it's still -- in this particular thing, it is not unilateral.

Let's remember -- we want the Court to understand that the customer service agent classification is a very broad classification. It involves virtually everybody you see at the airport: The people who load the luggage, the people who fuel the planes, the people who take tickets, the people who are out, you know, out on the ramp in the middle of the winter, the people who are taking tickets in St. Thomas in the Caribbean.

This system decides each and every job that this person gets; where they can work, when they're going to work, what kind of job they're going to have. This governs all of their expectations. All of them.



A MALE VOICE: Counsel, maybe to test that question that has been presented, suppose the existing mailroom person, who has the mailroom job today, is told by management, sorry, we have an ADA-eligible employee who needs to take your position. We're going to move you someplace. What rights does that employee have?

MR. THOMAS: Well, what would happen, it would affect in most -- in almost every circumstance, more than one employee. That employee would then likely ask to exercise his or her seniority, take a position that they want, which could then affect another employee, who would then want to exercise his or her seniority to get the position that they want. You would -- you could -- you would very likely have bumping and movement throughout the entire system.

And, you know -- and it does -- I mean, people. . .

[End of Tape 1, Side A.]

MR. THOMAS: . . . waiting a long time to get a particular shift so maybe they can get their kids to school or pick them up, so that they can go to school themselves. There's a variety -- as you can imagine, of reasons that people want particular jobs at particular times. And it's extremely upsetting.

A MALE VOICE: Where's the showing in the record that supports what you just said? Where's that developed so that we know that that is in fact more than your experience speculation as opposed to what really -- the impact on this particular employer would be?

MR. THOMAS: I don't think there is a lot of that in the record. I think it's clear when you have 14,000 employees under such a system, and you understand that as it is in the record, that every single job, every variety of job imaginable almost in -- in the airline industry is covered by

this system, that people are going to make those sorts of decisions and make --

What type of record would you need? It's absolutely patently obvious that that would be the case.

A MALE VOICE: Well, we're on summary judgment. Of course they have to construe the facts in a light most favorable to the plaintiff. So why isn't there a genuine issue of material fact in this seniority system, as in a collective bargaining agreement that we can read and we know is legal and enforceable, and then you would be subject to labor law violations if you violate it? Why isn't the genuine issue of material fact as to the nature of the seniority system and whether or not exceptions could be made?

MR. THOMAS: Well, there is a record on that particular point. It's clear that an employee who would otherwise be entitled to the job is not going to get it. And in our view that is enough.

A MALE VOICE: Why is that more of a hardship to accommodate a disabled person than it is with the exception with regard to catastrophic illness?

MR. THOMAS: Well, one is if -- I don't know if this has been developed in the record, but I could certainly say that one, there's going to be fewer of those. I mean the ADA is a very broad statute. It covers a lot of things that are beyond what we would normally -- might normally consider a disability, and it could have monumental -- it would have monumental effects to allow anybody with any type of ADA-protected disability to require an accommodation that would require us to deviate from the seniority system.

Obviously Mr. Barnett is not the only person in the company that has a back problem. And there are many, many people who have these types of issues, and it would lead to basically a disintegration of the entire system.



A MALE VOICE: Would that be something that would factually be developed rather than at summary judgment stage?

MR. THOMAS: Well, I think -- I think the summary judgment is pos -- on the seniority system is positive on the basic idea. It's clear that if I had the seniority and I had a right to that job, am I required to have my right violated --

A MALE VOICE: Well, that's also true with the other exception though, too.

MR. THOMAS: Yes, that is, that's true. I grant you that. And it is -- but it is part of the policy and nobody is deviating from the policy. There have been exceptions. I think there were exceptions in some of the other cases we talked about already where there was some limited exceptions to a seniority system where the court found that's -- that's not enough, we're not deviating from the policy.

A MALE VOICE: This question of a right to a job that you mentioned, though, sounds fuzzy in the record to me. I mean, is the seniority system in a policy handbook? Is that --

MR. THOMAS: Oh, absolutely.

A MALE VOICE: Does the handbook have any qualifying statements in it indicating it's not contractual, or does the handbook say it is contractual?

MR. THOMAS: I don't think it says either one.

A MALE VOICE: It doesn't say either one? Shouldn't there have been a hearing to determine whether the seniority system was contractual or not?

MR. THOMAS: I don't think in my view that the analysis is dependent upon having to be contractual.

A MALE VOICE: How do you square that with *Valent*? You know, we talked about that. It's a Title VII case. One of the holdings of *Valent*, which I think is instructive on a variety of issues that cut a number of

different ways, is that it's not -- a seniority system in and of itself doesn't trump. You have to look at the undue hardship factor, when -- and mix that into the analysis, which may be a factual question.

How do you square with what you're just saying with *Valent* and our treatment in that case?

MR. THOMAS: Well, I think that --

A MALE VOICE: Because your position is basically not -- from what I understand that seniority systems trump, right?

MR. THOMAS: Right.

A MALE VOICE: And we said they don't in *Valent*. How do you square that?

MR. THOMAS: Well, I think in that particular case, as I recall you -- the Court simply went on and said, and, you know, because it would require some minimal cost, they don't have to do it because that's part of the -- the Title VII analysis that's used in a religious discrimination case.

But I think in this particular -- in our case, you're talking about again -- and I think that case talked about being able to move people around potentially without violating their rights.

For example, in *Buckingham*. Certainly in that case the seniority system was so fuzzy and left so many openings and a few slots allocated. There was plenty of room as the Court -- District Court found below and then the Appellate Court agreed, that there was plenty of room for the employer to be able to accommodate the disability without violating actually any rights that any particular employee held. That's not the case here.

A MALE VOICE: Are you aware of any case that -- where an employee has sued the company claiming that his or her seniority rights were somehow violated in a context such as this?

MR. THOMAS: Well --



A MALE VOICE: Has it been adjudicated what the nature of these would be -- everybody's calling them rights. What the nature of these, the standing of these at law are?

MR. THOMAS: Clearly in the collective bargaining context there are many because there are seniority grievances filed all the time.

This particular case does present a fairly rare animal, which is a very strict non-collectively-bargained seniority system. But that doesn't mean that it still doesn't create the same rights and expectations.

I'm not aware of anybody -- and I don't handle all of U.S. Air's work on them, so I don't know. I don't know whether or not any agent has actually ever sued under this particular policy even though it's not collectively bargained.

A MALE VOICE: Is Mr. Barnett an at-will employee?

MR. THOMAS: I don't -- I don't -- again, that was never raised below. I'd have to check. I'm not sure that he ever signed -- would have signed an at-will statement in the kind of position he's in now.

And I should add that just -- the roof of employees is now actually is unionized. So at this point in time I'd have to refer to whatever agreement has been reached between the union and --

A MALE VOICE: Mr. Thomas, do you agree that Mr. Barnett has an ADA-covered disability?

MR. THOMAS: The panel asked us to brief *Thompson*, which we did. It was never really addressed. And I think in our response that we took the position that we did not think he was disabled. But the panel did not address that in oral argument or in its opinion. But we did brief that below and we believe he is not.

JUDGE FLETCHER: But Counsel, was that presented on appeal?

MR. THOMAS: I'm sorry?

JUDGE FLETCHER: This is Judge Fletcher speaking.

Was the issue of his not being disabled presented on appeal to the original panel?

MR. THOMAS: It wasn't originally presented by parties, but the court asked us to brief it.

JUDGE FLETCHER: Yes, but it was never presented as an issue by you to the panel in the first hearing.

MR. THOMAS: Correct. We -- we, as I recall at the oral argument, I raised it, and perhaps -- it may have been you, Your Honor, who made the point that that had not been raised. But we were asked by the panel at that time to brief the subject and we did.

A MALE VOICE: Counsel, there was a question raised by one of our colleagues earlier with respect to whether U.S. Air had ever offered a transfer to a different station, which would have met the accommodation. And your opposing counsel indicated that that either was not in the record or was simply not true. What -- what's the -- what's your version?

MR. THOMAS: I'm going to cite to the record. If you look at the Excerpts of Record, page 98, which is a Declaration of --

A MALE VOICE: Did you say 98?

MR. THOMAS: Yes, 98.

A MALE VOICE: Paragraphs 3 and 4?

MR. THOMAS: Correct.

The -- Mr. Cohen, an attorney for U.S. Air, was contacted by the EEOC and informed -- he informed her that there were no positions available at SFO, San Francisco Airport, where he could perform the essential functions of the job with or without accommodation.

And I'm summarizing here: Mr. Cohen asked Ms. Horn to find out whether it be -- Mr. Barnett would be interested in transferring to another location. Ms. Horn --



This is during the conciliation process after the charge had been filed that the EEOC was acting as a conciliator.

Ms. Horn came back to Mr. Cohen and advised him that he was unwilling to relocate to another station and that he was insisting on the accommodations he had previously requested.

If you look at the Excerpts of Record, page 225, you see Mr. Barnett's response to that. Which he stated, and I'm reading from paragraph 20, "I never stated to Investigator Diana Horn at EEOC that I was unwilling to relocate to another U.S. Air station, or that I was insisting only on the accommodations I had previously requested. I told Ms. Horn only that I did not want to leave the Bay Area because both of my parents are living here, are elderly and disabled, and need my presence. She told me in her opinion that I did not have to leave the Bay Area to be reasonably accommodated. I don't know what she may have said to Attorney Cohen of U.S. Air or how she may have said it."

So certainly the company offered that to the EEOC as part of the conciliation process, and we were certainly told that he was not interested. And I think his own response is somewhat illustrative.

And it's clear also it was one of the undisputed facts below on summary judgment that Mr. Barnett has never attempted to utilize his seniority to bid for another position or to another station.

And also there was another statement made about discovery not being complete. Discovery was complete. I mean, I -- in my entire career I don't think I've ever filed a motion for summary judgment early. And in this particular case, discovery was completed.

So there is no question that everybody had a full opportunity to identify what potential jobs were out there, to raise any issues, to discuss any of the proposed

accommodations. That was all fully investigated, full discovery, fully briefed, and fully addressed.

A MALE VOICE: You mentioned that he had not used the system counsel for -- Mr. Barnett indicated that he in fact had one bid outstanding. What's the resolution?

MR. THOMAS: Well I really don't know what he's referring to. What happened as to the original dispute, was that he asked, I want to stay in the mailroom on the swing shift job.

When after several months he was allowed to have his limited-duty extra-person job, continuing to perform that duty as an extra person, when that came to an end, he then quickly asked that additional accommodations be made with respect to the cargo position.

So he didn't really even exercise his seniority bid to those jobs.

And I should state, U.S. Air never told him he couldn't have the position. Never told him that.

So he's on leave. And he's never been told he can't come back. He's never been told he can't exercise his seniority. He's free today to exercise his seniority, to look at any openings that we have, and to work with us to find any type of accommodation that could be reasonable.

Essentially he put all his eggs in the basket of the seniority system, and then thereafter with respect to the cargo position, he want to have a cargo position that didn't involve working with cargo, which is a problem. And he wanted a robotics device where there was absolutely no showing by him that it would allow him to do anything that he couldn't do using a forklift. And that's why those accommodations were not accepted.

But at no time has he been prevented from coming back to the cargo position. The only thing he's been prevented from doing by the company was to in our view



violate our seniority policy and the legitimate rights and expectations of his co-employees.

A MALE VOICE: Is it correct that under this directive the only suggestions of what might be a reasonable accommodation were made by the plaintiff, and U.S. Air never suggested what its own view was as to what might be a reasonable accommodation?

MR. THOMAS: Well, I think once he was told that the seniority was not -- you know, we weren't going to violate the seniority policy, and he fairly promptly after that filed this charge and went to the EEOC and we were in conciliation, I would say that yes, we did talk to the EEOC as the conciliator about whether or not he would be interested in trying to find a position at another station. And to that we were told he wasn't interested.

A MALE VOICE: What kind of a position were you talking about?

MR. THOMAS: Well, I don't think anybody had a position in mind. If you look at his restrictions, which basically said: No prolonged standing, no prolonged sitting, no excessive bending, twisting, turning, pushing, pulling It's very hard for an employer under those circumstances to figure out, well what exactly can this person do?

So when you're looking at vacancies, that's where I think if he had been interested in trying to leave this, the Bay Area, there could have been a more of an interactive process to talk about what types of jobs might have been available. But he never pursued that.

A MALE VOICE: If the seniority system were not a problem, there was a position -- there were positions in the mailroom, obviously, in San Francisco; were there not?

MR. THOMAS: Well, what happens is that when schedules change, and as we said in our briefs below obviously U.S. Air's presence in California Bay Area has dramatically gone down to almost zero, if not zero at this

point. There -- what happens when there are schedule changes, the entire station is rebid, because all of a sudden you might need more here or less there. A new schedule is posted or new flights coming in at different times and changes. The whole schedule is rebid.

So there were mailroom positions, but there were people who -- with seniority who wanted them and had more seniority. And as I --

A MALE VOICE: [Unintelligible.]

MR. THOMAS: All right. Let me make one extra point there, if I can connect if for you.

A MALE VOICE: All right. Go ahead.

MR. THOMAS: Let's keep in mind that he only wanted the swing shift mail position. He would not take the day, and he would not take the graveyard mail position. It was only one shift in one position.

His own doctor said he could not perform the graveyard mail position. So there was -- I think there were two swing shift mail positions for which he could not hold because of his seniority.

A MALE VOICE: Well, were they vacant? Were they -- was that an option?

MR. THOMAS: No, because when they go up for rebid, they're bid by seniority. That's the same way he got the position, was by utilizing his seniority. So no, they weren't vacant in that sense that another employee had a right to those positions.

A MALE VOICE: But would his own seniority have been high enough to bump the graveyard shift employee, if he -- if he so choose?

MR. THOMAS: AS I recall, yes, but he was clear that he could not perform that job. He did not want that job.

A MALE VOICE: In other words, he could have had it, but he declined to pursue it.



MR. THOMAS: I want to make sure I'm not misstating the record. It was either the graveyard cargo or graveyard mailroom.

But he was very clear -- and in fact the doctors and the evaluators evaluated some of these other positions -- he was very clear he would only take the swing shift position.

A MALE VOICE: Well, but --

JUDGE FLETCHER: Where is that in the record, Counsel?

MR. THOMAS: It's in many places in the record. If you look at the job analyses that were prepared, you will see that those job analyses included some of these other positions. And it is -- which his counsel and Mr. Barnett signed off on as being accurate.

And his own doctor came back and said, we can only -- he can only perform the mailroom swing position.

A MALE VOICE: The ADA is real -- is silent on this. And when you contrast that to Title VII, you wonder why. The panel opinion itself said silence suggests that Congress did not intend for a seniority system always to trump reasonable accommodations of a disabled employee.

Congress knew how to write this into the ADA if it wanted to, and it apparently chose not to. What do we make of that? The Senate Report says that it should be considered one factor of a collective bargaining agreement.

MR. THOMAS: Well, I think when we look, again, the ADA is in many respects modeled on the Rehabilitation Act. And we have a -- we do have a long history under the Rehabilitation Act of recognizing bona fide seniority systems. So we do have that bit of history and --

A MALE VOICE: All the more reason why it could have and should have been in if your position is correct.

MR. THOMAS: Well, except that I think that the Congress is fairly clear about really saying that they were piggybacking on the Rehab -- under the Rehab Act.

And, you know --

A MALE VOICE: Fairly clear. What does "fairly" mean? I mean the Senate Report says the collective bargaining agreement could be relevant.

MR. THOMAS: Well, I think fundamentally what this comes down to is, I mean, is a seniority system a -- always a trump?

In my view what makes Mr. Barnett's request unreasonable is that I can think of a lot of reasons that an employer wants a seniority system. It keeps people longer. It gives them an easy way to -- a rational way to make assignments, and so on. But really the most fundamental issue to me is it violates another employee's rights and expectations. And this may have -- this may have application beyond just a seniority system.

A MALE VOICE: Where in the record does it make clear specifically that it would violate another employee's rights, that it's a contractual obligation that would violate another employee's rights?

MR. THOMAS: Well, what's clear in the record is --

A MALE VOICE: But is there --

MR. THOMAS: -- it is in the record that it's a policy --

A MALE VOICE: I understand it's a long-standing policy. But is it -- was it adjudicated below, or is it clear through some stipulation that it would violate another employee's legally enforceable rights?

MR. THOMAS: Well, I think those are characterizations or getting a particular act or event or reading a certain characterization that it's a legally protectable right. I think that's what the panel is going to decide.

But it's very clear in the record that this policy is long-standing, that the employees depend upon it, that



another employee wouldn't receive this job if Mr. Barnett took it, even though the other employee had more seniority.

A MALE VOICE: But couldn't there have been a hearing in the trial court to determine the issue whether other employees had a contractually legal right to this seniority system?

If U.S. Air is sued tomorrow by a different employee on a different issue relating to the seniority system, are you free on behalf of U.S. Air -- not necessarily you personally, but can U.S. Air have it counsel get up and take the position that it's not a contractual policy?

MR. THOMAS: I don't think they would take that position.

A MALE VOICE: Well, but are they free to do that as far as any stipulation's concerned?

MR. THOMAS: Well, I mean, in the respect -- is there some legal prohibition in existence that would prohibit them from doing that? I'm not -- I don't -- I'm not aware of one.

But the point -- the point is they would not take that position because this is how they have operated, and this is what they think is a fair way to operate, and that's how everybody has relied on it operating all these years.

A MALE VOICE: All right. Mr. Thomas, [unintelligible], Counsel.

MR. THOMAS: Thank you.

THE COURT: [unintelligible] has two minutes to respond.

A MALE VOICE: Barry [unintelligible], Your Honor. To pick up a couple of things.

First of all, the -- I believe the response of the appellant concerning the *Thompson* case is that we have submitted very careful evidence through the vocational rehabilitation counselor expert that Mr. Barnett's restrictions met the test of *Thompson* because he had specific inabilities,

and it prevented him from a broad range of jobs in various classes that was submitted in the record below.

Secondly, the accurate citation to the existing record that I made concerning contrary information to what counsel said about U.S. Air's position or not is contained in the brief of --

A MALE VOICE: You're referring now to U.S. Air taking a position that this seniority system creates no rights?

A MALE VOICE: Correct. This is in the BREF brief submitted as amicus curiae in support of our position. And I'm referring specifically to page --

Excuse me I just keep missing it in my --

A MALE VOICE: This is in an amicus brief, not part of the record?

MR. THOMAS: It is an amicus brief. It is part of the record. It was authorized to be filed and it was filed.

And a citation is contained in the footnote on page 9 of their specific brief in support of appellant on rehearing involved. They submitted two briefs, which is why I was confused. One for the petition, and then one on [unintelligible].

A MALE VOICE: Who's the "they"?

MR. THOMAS: The "they" is a collection of amicus called Disability Rights Advocates, Disability Rights Education and Defense Fund, Employment Loss Center, San Francisco, and New York Lawyers for the Public Interest, and the Western Law Center for Disability Rights and World Institute on Disability.

Page 9, footnote 3, from their brief reads as follows: California Labor Code, Sec. 2922, California employees presumed at will. See also [unintelligible] U.S. Air. 1985 case in Massachusetts, U.S. Air successfully argued the personnel policy guide did not create enforceable contract. And same argument accepted in another case. U.S. Air Inc. as challenger. U.S. Air Inc. 1985.



A MALE VOICE: Who is the onus to U.S. Air? Is that the 1985 [unintelligible] cite 15470?

MR. THOMAS: That is correct.

THE COURT: Okay, Counsel. Your time is expired.

A MALE VOICE: Yes. Thank you very much.

THE COURT: The case will be submitted and [unintelligible].

STATE OF CALIFORNIA )
) SS.
CONTRA COSTA COUNTY )

I, Nancy S. Oram, do hereby declare, under the laws of the State of California:

That I have been transcribing legal documents since 1976;

That the foregoing transcript was transcribed by me into typewriting from cassette tape(s);

That the foregoing transcript constitutes a full, true, and correct report of the proceedings recorded on the cassette(s), except as otherwise noted;

That I am a disinterested part to the foregoing proceeding.

IN WITNESS THEREOF, I have hereunto subscribed my hard.

Dated: February 19, 2001

s/ Nancy S. Oram
Nancy S. Oram

**APPENDIX B**

**Lawrence Deposition, Exhibit X**
**Appellee's Excerpt of Record, p. 11**

USAir
Agent
Personnel Policy Guide
3-10, Page 5
December 1, 1993

Transfer Requests (cont'd.)

Catastrophic Medical Transfer Request
Employees may request a medical transfer if only they or a member of their immediate family* are suffering from a catastrophic illness.

*Note: For the purpose of this policy, the immediate family is defined as spouse and children only.

You may transfer within the same or to a different geographic location in the same classification only.

A confidential written transfer request explaining the reason you desire the transfer must be submitted to your local manager along with a written statement from your physician, or at USAir's request and expense, a USAir appointed physician, revealing the nature of the illness. Your medical information will remain confidential at all times.

An employee awarded a catastrophic medical transfer may be required to submit an updated medical certification from a health-care provider in the event of a reduction in force, or other circumstances, as deemed necessary.

In the event of a reduction in force, the employee will be exempt from displacement from the location, if it is determined by the Department Officer that the catastrophic medical condition still exists; if it does not, you may be subject to displacement based on adjusted company seniority.

Catastrophic medical transfer requests must be approved by the Department Officer, or his/her designee, or a case-by-case basis.

If awarded a catastrophic medical transfer you:

- will receive a position in your desired location, regardless of your seniority date.
- pay the entire moving costs and settlement expenses.
- cannot use the catastrophic medical transfer policy again to return to your original location or any other location.
- cannot bid or request transfer for one (1) year.

continued...

(Lawrence Exhibit No. X, 12/8/95)
(ER P. 11)